UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF PENNSYLVANIA

IN RE:	Chapter 11
W.R. GRACE & CO., *et al.*,	Case No. 01-01139 (AMC) (Jointly Administered)
Debtors.	
Continental Casualty Company, *et al.*,	
Plaintiffs,	Adv. Proc. No. 15-50766
v.	
Jeremy B. Carr, *et al.*,	
Defendants.	
Barbara Hunt, Personal Representative for the Estate of Robert J. Hunt, deceased and Sue C. O'Neill,	Adv. Proc. No. 18-50402
Plaintiffs	
v.	Courtroom No. 5 900 Market Street Philadelphia, PA
Maryland Casualty Company,	
Defendant.	July 17, 2019 10:00 A.M.

TRANSCRIPT OF HEARING
BEFORE HONORABLE ASHELY M. CHAN
UNITED STATES BANKRUPTCY JUDGE

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(Proceedings commence 10:03 a.m.)

COURT CLERK: The court is in session. You can be seated.

THE COURT: Okay. I know that there are a number of parties on the phone, but why don't we have everyone in the courtroom state their name for the record, please.

MR. COHN: Yes, Your Honor. Good morning. Daniel Cohn for the Montana Plaintiffs. And I'm joined here by Allan McGarvey --

THE COURT: Okay. Good morning. Welcome.

MR. COHN: Also for the Montana Plaintiffs. Thank you.

THE COURT: Okay.

MR. BURGESS: Good morning, Your Honor. Brian Burgess, CNA Companies.

THE COURT: Okay.

MR. GIANNOTTO: Your Honor, Michael Giannotto for the CNA Companies.

THE COURT: Okay.

MS. DECRISTOFARO: Good morning, Your Honor. Elizabeth DeCristofaro for CNA.

THE COURT: Okay.

MR. WISLER: Good morning, Your Honor. Jeffrey Wisler for Maryland Casualty Company.

THE COURT: Welcome.

MR. LONGOSZ: Good morning, Your Honor. Ed Longosz on behalf of Maryland Casualty Company.

THE COURT: Okay.

MR. MILLER: Good morning, Your Honor. Evan Miller for CNA.

THE COURT: Okay. All right.

And then the parties on the phone, if you could please introduce yourself without talking over each other.

MR. HIGGINS: This is Robert Higgins representing W.R. Grace.

THE COURT: Okay. Do we have anyone else on the phone?

MS. MARKS: Yeah, Pam Marks representing W.R. Grace.

THE COURT: Okay. Anybody else?

(No verbal response)

THE COURT: So, Tina, are there just two parties on the phone? Three. Okay.

So, I hear that there's a third party on the line.

MR. HORKOVICH: Robert Horkovich.

THE COURT: Who:

THE CLERK: Horkovich.

THE COURT: Robert. I'm going to slaughter your name if you make me say it. Robert, are you on the line?

(No verbal response)

THE COURT: Okay. Well, perhaps, Robert has dropped off or muted us. In any case, why don't we just, I guess, just talk about how the day is going to go. I did receive the agenda, so I suppose CNA would take the first argument. And I'm not sure maybe Maryland would go after that, when I know that they deferred to CNA for part of the briefs.

So, did you have a proposed way that you were going to present your argument to me today?

MR. BURGESS: That's fine, Your Honor. That's how we were planning to proceed.

THE COURT: Okay. And then we'll hear from the Montana Plaintiffs.

MR. COHN: That's fine with us, Your Honor.

THE COURT: Okay. I'm not sure how long is going to take. I've blocked out the entire day until five. I was planning to take a lunch break at 12:30. I thought all of you would do your arguments.

I guess, I'm going to try really hard not to interrupt you during your arguments, but I do have questions that I'd like to ask both sides. And I guess the one thing that I would ask you to incorporate into your arguments today are the Johns-Manville cases.

The way that I view this case is the Third Circuit has viewed favorably the framework set up in the Second

Circuit case Quigley. And when you look at Quigley, there are three Johns-Manville cases there. And they really set out for me what the derivative, non-derivative inquiry is and I'd just like both of you to consider that in your arguments today.

Okay. Any questions before we begin?

(No verbal response)

THE COURT: Okay. Well, please proceed then.

MR. BURGESS: Good morning, Your Honor. Brian Burgess for CNA.

This case turns on the scope of a channeling injunction entered into the Grace bankruptcy under Section 524(g). The purpose of that injunction is to channel claims, asbestos-related personal injury claims brought against Grace and certain protected third-parties, such as settled insurers like CNA out of the state tort system and into a trust set up for compensation; a trust that CNA contributed $84 million dollars to, to resolve all this outstanding liabilities to Grace that derived from its provision of insurance.

As Your Honor knows, this case is returning from the Third Circuit which from Judge Carey's decision, in part, and vacated, in part, remanding to address a few discreet issues involving whether the claims as stated in the Montana complaints are derivative of Grace's liability or wrongdoing and whether they arise -- claims arise by reason of our

provision of insurance.

I think it's important to note that the Third Circuit's opinion in its approach to the case sort of narrowed the issues in particular by rejecting some of the arguments that the parties had previously presented to Judge Carey and so, I think narrowed the sort of scope of the inquiry as to open those prongs.

As to the plaintiffs, it made clear that claims were not limited to insurance policy proceeds. I think to the extent there's any ambiguity about what derivative means, it can't mean that, that the claims are limited in that manner. But it also made clear that derivative is not the same in this context under 524(g).

It's not the same as vicarious liability because claims could be based on, in part, on the wrongdoing of the insurer and would, nonetheless, be derivative including claims that might be characterized as claims for direct liability as a matter of state law, but nonetheless.

THE COURT: Excuse me; has someone joined the hearing?

MR. HORKOVICH: Rob Horkovich rejoining.

THE COURT: Okay. It's nice to have you here. We're in the middle of the beginning of CNA's argument.

MR. HORKOVICH: Thank you.

MR. BURGESS: It made clear that vicarious

liability is not the same as derivative in this context. I'm just going to note that even claims that might be -- claims for negligence that might be characterized as direct under state law could still be derivative in the relevant sense under 524(g).

And on our side, it overbroad our proposition that a claim was derivative necessarily but it was based on an entry from Grace. Asbestos, as it noted, although that involvement in Grace asbestos was certainly relevant, it wouldn't be dispositive because there are other ways in which the involvement of Grace's asbestos might be purely incidental and not the sort of basis for the underlying legal duty.

So, ultimately, we have two questions for the court to address. The Third Circuit set out to relevant test. As to the derivative requirements, whether CNA's alleged liability under the Montana claim is just wholly separate from Grace's wrongdoing or liability. And as to the statutory relationship whether the claims arise by reason of CNA's provision of insurance which the court explained depended on whether the provision of insurance is legally relevant to the Montana claims based on the cause of action under state law.

I thought in terms of sort of structuring my argument, I thought it might be useful to first lay out how

we understand those tests and what we think they mean and what we think they can't mean. And then I'll sort of go through the application of why we think the Montana claims under our understanding of the test satisfied both of those requirements.

So, to sort of start with what understand my friend on the other side's argument to be their view is that, as to both prongs what the Third Circuit essentially adopted was a legal element's test under which in order for a claim to be subject to channeling under the injunction, it would have to be the case that you would have to show in every instance sort as a matter of like it would have to be charged -- fleeted and charged to the jury and proved that Grace's liability is an element of the offense and that actual providing insurance is an element of the offense.

And we think that has to be wrong for a few different reasons. One of which, which we set out in length in our reply brief is that as far as we're aware, the only claim that that described is a claim essentially for insurance policy proceeds where the fact that someone has an insurance contract is itself an element to the offense. The fact that you're being held vicariously liability for the insured's conduct is an element of the offense.

And if all that the test describes is the insurance policy proceeds which the Third Circuit made quite

clear cannot be the limit of what is covered by 24(g) as to insurers. We think that can't be right.

We think that test is also too narrow for a few other reasons in terms of how the court actually described the relevant elements. To take the -- by reason of insurance, for example, in the legal relevance.

The way the court set out the inquiry is that stated on remand the task would be to identify the elements, put the (indiscernible) under state law and then determine whether the provision of insurance was legally relevant to those elements. It didn't indicate that you have to determine whether the provision of insurance is itself an element which we think would be a rather different test.

And we also think that that sort of understanding is inconsistent with what the court said about the element in footnote eight of the opinion where it indicated, you know, describing our arguments to the extent we had sort of agued that the provision of insurance was the basis for the duty under state law.

And the court indicated well, you know, if so, duty is clearly something that is legally relevant as a matter of the cause of action. It remanded because it didn't know what the relevant choice of law was, what the elements would be under state law, whether that state would adopt 324(a) as the plaintiffs had previously argued. But it

indicated that sort of relationship, rather than being an actual element, would be something that could satisfy.

And so, to as to the derivative requirements, would the court, you know, specifically indicated that the analyses were similar. It also in describing it, again, it didn't indicate that it should be an element of the offense. It asked the question of whether Grace's liability or wrongdoing is wholly separate from the claim against CNA.

And we also, and this is also something we developed in our brief. The Third Circuit gave some examples that we think are instructive to what derivative can mean and what it can't mean.

If referenced, for example, the Gas case, the Dodds' decision. And what we draw from those cases is that they're instances in which, particular in Gas and one of its cause of action was under 414 of the restatement where it's clear that the liability of the other party is not an element of the offense.

It's much like in this sort of situation someone is being held liable for not protecting, from not guarding against injury that someone else created. And we think that the reference to those decisions is a good indicator that the court contemplated that as potentially being something that could be subject to the derivative requirement, notwithstanding it not being a formal element under the law.

And the plaintiffs have argued in reference to those decisions that while, you know, there's no reason to read the Third Circuit as embracing everything in those five cases that are cited as necessarily being derivative. That's not our argument. But the court did with insights identify particular theories and causes of action in those cases.

As to Gas, it specifically pinpointed 410 and 414 of the restatement. As to Dodds, it noted the difference between direct claim for supervisor, the liability versus an indirect claim based on respondent's superior.

And given that all those citations were provided in reference to the court's observation that the derivative isn't restricted to instances in which there's no wrongdoing on the part of a third-party, you think it has to have been referencing those direct theories rather than, for example, in Dodds, the claim that was contrasted responded superior is by its nature something that exist without fault. So, we think those are good cues.

You mentioned the Johns-Manville decision at the outset. And I do think it's important to note that in the Third Circuit's decision, it had a footnote referencing Johns-Manville and the ways in which it thought it did not necessarily control the inquiry.

We do think it is important in that it sets what you're sort of looking to for -- like what could be

derivative. And, you know, there was also the footnote seven in the court's opinion where you're going to be looking to and I think it also might have referenced Quigley in this regard, whether the cause of action is -- right. Whether the cause of action is something that is based on a duty that the insured owed to the debtor and then that's the way in which you're sort of -- the third party is bringing the cause of action.

I also think, you know, Manville itself was distinguishable on facts because their the claims were not based on exposure to the Travelers' asbestos. The idea was that they had supposedly acquired knowledge of the risks by virtue of providing insurance to Travelers. But then the idea was to try to hold them liable for claims based on insurance coming out for other parties.

But to the extent, I do think --

THE COURT: I'm just a little confused by that.

MR. BURGESS: Yeah, sure.

THE COURT: Because, you know, the Second Circuit in Manville III talked about, they were focused on Travelers' actions and whether or not those were derivative or non-derivative claims. And it was my understanding that Travelers was the main liability carrier for Johns-Manville through the decade where it was doing most of its mining or manufacturing. And it was, in fact, claims against

Travelers. I'm not sure.

I know that Chubb was involved in Manville IV.

MR. BURGESS: Sure.

THE COURT: But it was really, you know, Travlers' duty.

MR. BURGESS: That's right. There were claims against Travlers. My understanding is that the claims were based, in part, on policies that they provided to other carriers, asbestos liability related.

THE COURT: Okay. I mean I've literally read Manville decision --

MR. BURGESS: Sure, no I understand.

THE COURT: -- like twenty times and I've never seen a distinction about the --

MR. BURGESS: Okay.

MR. GIANNOTTA: Your Honor, can I add something on CNA just because he wasn't around back then. You know because I was involved in the Manville part of this.

THE COURT: Yeah.

MR. GIANNOTTA: In Manville, Travelers was -- the people who were suing Travelers were not necessarily exposed to Manville asbestos. They were exposed to asbestos of other product manufacturers. And Travelers was being sued on the theory that it gained knowledge of the asbestos hazards because it was Manville's insurer. And, therefore, it should

have warned these other people.

But there was no -- And if you read the District Court opinion and the Bankruptcy Court opinion in Manville, it makes it clear what the facts are which those were the facts. And so, in that case, it wasn't an instance in where Travelers was being sued for failure to protect these people from their exposure to Manville asbestos.

It was a case where the folks were suing based on exposure to somebody else's product. And Travelers was being sued on the theory that learned about the dangers of asbestos from Manville and, therefore, it should have come in and warned these other people.

So, there was no connection to Manville asbestos. I mean some of the people were exposed to Manville asbestos, but most of them were not. And the District Court and the Bankruptcy Court opinions do make that clear and, in fact, we had briefed that to the Third Circuit the first time up. And

so, in our view, it's a totally different situation here where we're being sought to be held liable for failing to protect people to exposure to the debtors' asbestos. That wasn't the case in Manville.

THE COURT: Right, but the Third Circuit has said in its opinion that it can't simply, you know I think what the Bankruptcy Court did was it was looking at relevant Third Circuit law in this context and was sort of making a

distinction that if you have injuries based upon Grace's asbestos then that should be derivative. And if it's not Grace's and its non-derivative and the Third Circuit said well that's not right.

You can't simply look at it to see whose asbestos you're injured from, right. That's what --

MR. GIANNOTTO: I think that's incorrect, Your Honor. I think the Third Circuit said if it's not Grace's asbestos that it's not derivative. They did say that. And then they went onto say but if it is Grace's asbestos that's relevant but not necessarily dispositive.

But I think the Third Circuit did say in its opinion that if you are -- if it is not Grace's asbestos and they cited Combustion Engineering which was a case like that where it was somebody, you know the parent wanted to get the benefit of the injunction but they had their own asbestos products or something.

But I think the Third Circuit pretty clearly did say that in the opinion of this case. If it's somebody else's asbestos then it's not derivative. If its Grace's -- the debtors' asbestos then you got do more and you got to apply a test.

And I can find the quote for you if you like.

THE COURT: That's okay. I mean we'll get into Johns-Manville after he's, you know --

MR. GIANNOTTO: Okay. Thank you.

MR. BURGESS: As my colleague was talking, I was just pulling up the footnote in which the court addressed Johns-Manville which I'm sure the court has read.

THE COURT: I just want to make sure you speak into the microphone.

MR. BURGESS: Oh, I'm sorry.

THE COURT: That's okay.

MR. BURGESS: Yeah, okay.

As my colleague was talking, you know -- maybe is that better?

THE COURT: Yes.

MR. BURGESS: Thank you.

I was looking up the footnote where the court addresses -- the Third Circuit addressed the Johns-Manville decision as I'm sure the court has also reviewed. But I do think there's a couple of important things to get out of that footnote.

It noted in that instance, it was undisputed that the claims were being directed at Travelers solely for its own wrongdoing where it says here, that stands in contrast (indiscernible) before us which centers on whether following 524(g) the Montana claim seek to recover from CNA directly or indirectly for Grace's wrongdoing.

One thing that I think is important about that

footnote is its referenced to Grace's wrongdoing not solely its liability. We think that is an instance in which the court sort of -- so in some instances where it set out the test, it referred to Grace's liability. In other instances, such as this one, it referred to Grace's wrongdoing which we think is a signal that the courts were using those concepts interchangeably.

And really the relevant question is whether under state law, Grace's -- the fact that Grace sort of engaged in this wrongdoing is being as the trigger for establishing our liability, for establishing, for example, our duty to act. And we think it's significant in that regard that if you review the Montana complaints the nature of the actions against us are not based on risk that we independently created.

They're always based on -- you know, there's a section laying out the various wrongdoing that Grace engaged in that some of the allegations included being in concert with the state. But wrongdoing that Grace engaged in to create this tremendous risk of asbestos exposure.

The allegations against us consist entirely of failure to protect against that, failure to warn about it, failure to do adequate investigations about it. And we think that is indicative that liability is being sought here based on Grace's wrongdoing that it's not wholly separate from it.

In reference to sort of the court's, the Third Circuit's discussion about the relevance of asbestos and being Grace's asbestos as my colleague noted, if it was not Grace's asbestos, we think that is clearly non-derivative.

I think what the court said that was over-broad in our argument and in Judge Carey's decision was that it's not sufficient to say that it's Grace's asbestos. It's obviously relevant but it's not going to be dispositive in what the Court instructed is to identify the elements that exist under state law and to determine, based on those elements, whether Grace's liability or wrongdoing is going to be sort of a potential trigger for liability.

And I can sort of transition maybe know into why I think the different causes of action that or the different sort of legal theories that plaintiffs have specified why they would fit those tests as we understand it.

Before getting into that, I do think it's worth noting as we did in our briefs that previous in the litigation plaintiffs had always relied on 324(a) as their legal theory and the basis for liability as discussed by Judge Carey in his opinion is something they cited in the briefs.

So, we think it's interesting that they decided to change course in this proceeding. That issue as Your Honor probably knows is now before the Montana Supreme Court in

terms of whether 324(a) is the relevant source of a legal duty is what the proper way to describe this cause of action. Because that's before the Montana Supreme Court and involves an issue of state law and not inclined to sort of parse out those sort of differences.

Instead as we did in our reply brief and as to certification, our view is that even under their sort of framing of their alternative theories we think they still would qualify as derivative and rising by reason of the provision of insurance. And so, I'll go through starting with 324(a) and then I can also address their additional theories if that's okay with the court.

THE COURT: Sure.

MR. BURGESS: So beginning with 324(a) which is often referred to as the Good Samaritan Rule.

"It's imposing a duty on one who undertakes to render services that it should recognize is necessary for the protection of a third-party."

And also would have to fall within one of three conditions to be subject to liability. So, the key to that is both the undertaking to provide services and the recognition that there is a serious risk to a third-party.

So what's triggering the duty there is the creation of a risk by someone else in this instance, Grace. And we think it's important there would not be a preexisting

duty for CNA to protect people. The idea is that because they've undertaken an obligation, allegedly undertaken an obligation to Grace and because being in that position, they necessarily became aware of a risk that Grace created by virtue of its wrongdoing.

We think that has to qualify as derivative under the court's test because the conduct that Grace engaged in, what Montana plaintiffs have themselves alleged and was clearly established throughout these bankruptcy proceedings was Grace's wrongful, you know, dangerous operations that created the serious risk.

And, again, when you look to the complaint, the underlying state court complaint and the allegations that are pressed against us, there's no suggestion that CNA created a new independent risk separate from Grace. The whole basis for the liability asserted against us is that we did not do more to protect against or to mitigate a risk that Grace had created.

And the other side has argued that we are sort of -- well, they've made a couple different arguments in regard to that. One, they claim that we are only focused on the facts and they say it's divorced from the elements of state law. But I don't think that's accurate because, again, what is creating the duty under 324(a) has to be a recognition that another party, in this instance Grace, has created a

serious risk. But for that, there would not be such a duty.

So that is serving as a trigger to our alleged legal liability as a matter of state law. We agree it's not a formal element in the sense of it would have to be something pleaded and proved to the jury. But for the reasons I articulated earlier, we don't think that that can be the test because it's not consistent with the way the Third Circuit framed the issue and it's not consistent with recognizing that the scope of 524(g) can extend beyond claims just for insurance policy proceeds.

And the Montana Plaintiffs have also now tried to argue that it's a mistake to say that Grace was the sort of agent of the harm, agent of the risk. They say that it's a mistake to refer to them as being equivalent to a mistake to refer to them as being equivalent to a knife wielding terrorist. And, instead, the underlying risk is just that asbestos is risky in that you know properly controlled and maintained, it wouldn't present the risk. But that is just the way the case was ever framed by them.

Again, if you look at the Montana complaints in the way in which they are saying that there was a risk that was created that gave rise to a duty, it's littered throughout the complaint's allegations of Grace's wrongdoing, that the wrongdoing created this risk of asbestos exposure, that they did not comply with various federal and state law

requirements. That, you know, as others were giving them warnings or guidance, they were not following it.

And, of course, as to CNA, CNA came onto the scene as Grace's insurer in the early 70s, you know, decades after Grace had been in operation. And the allegations in their complaint speak to a -- or a danger and a risk that was present and known about for years before CNA came there.

So, we think it's clear that they are basing our alleged liability, our alleged duty as matter of state law on wrongdoing that Grace itself has engaged in. So that's the 342(a) and why we think it would satisfy derivative.

We think their competing theories that they've now raised on remand satisfy the derivative requirement and for similar reasons. The duty to warn claim, for example, the alleged duty is predicated on their being a serious risk of harm that we were in a position to discover as a worker's compensation insurer.

And, once again, the serious risk that that must be referencing that would be the trigger for our legal duty is the wrongdoing that Grace engaged, the dangerous operations it was involved in, and the claim against us is for not warning about that risk and protecting people from that risk.

Similarly, with their professional negligence theory which we sort of understood as being very similar to

the 324(a), but sort of a 324(a) light. You still have to have an undertaking. You still have to have sort of a recognition of a serious risk. They would just say that you don't necessarily have to satisfy one of the three prongs that 324(a) specifies must generally be satisfied before there would be potential liability.

But because, again, the theory of liability, the theory about why we acquire a legal duty that an ordinary bystander wouldn't have to step in and prevent a harm is because we engaged in services to Grace, because we had an undertaking so our obligations flow to Grace. And in that capacity, we became aware of harm that Grace was creating and that we failed to take adequate measures to stop that harm. So that's we think those claims also would satisfy the derivative requirement.

As to the statutory relationship part of the test where again the question is, is it legally relevant; not is it an element of the offense. And, here, the whole sort of basis for the claims against us arise based on inspections and loss control services that we allegedly undertook by virtue of our role as an insurer. That those are the only basis for the claim that we somehow acquired a legal duty to step in and prevent harm that Grace was creating or to warn others about that harm.

And we put forward in briefing here and have done

consistently in the Third Circuit and before Judge Carey, it's well established and well acknowledged that a provision of insurance, central aspects to it, inherent aspects to it involve engaging in inspections, engaging in loss control services to sort of understand the nature of the risk and to be able to take measures to potentially mitigate that risk. But that derives directly from the provision of insurance.

And the statutory language arises by reason of the provision of insurance. It's not arises by virtue of a provision in the insurance contract that obligated you to do x or y. So, we think the relevant question is, is this a duty that we allegedly acquired under state law, under their theories because of things we were doing in our capacity as an insurer.

And they've raised a few arguments in contravention of that. They've said, insurers may engage in these activities but that's not, there's no reason someone else couldn't be doing it. It doesn't have to be connected to your role as an insurer. Someone else could have just been providing these industrial hygiene services on their own.

And we think that argument proves far too much. That's not what the relevant inquiry is in terms of whether something is legally relevant. I mean, after all, as we noted in our briefs, it would be possible for a non-insurer

to also indemnify, create an indemnity contract, not one would dispute that bear possibility provides a reason to say, well, you know, this is not arising by reason of insurance when you're seeking to collect proceeds under a policy.

They've also raised the point that the contract provision itself specifies that we are not obligated to engage in these inspections and services. And we are not undertaking it for the benefit of a third party. And they say how can a contract that disavows this sort of obligation be a source of it.

And we think that that just mixes up what is the federal question here in terms of by reason of the provision of insurance versus what might happen in the state law litigation.

The fact that the contract provisions make clear that we are undertaking these services on our own behalf just as part of an obligation -- part of something insurers do to identify the relevant risk and to try to mitigate it to the potential extent.

It's a reason why under 324(a), for example, there might well not be an undertaking that was recognized that needs to be for the protection of third parties or it might be a reason why one of the different prongs isn't met, but we still think the nature of their claim under any of the theories is based on the things that we took on that they

specifically acknowledged.

I think this is at page 45 in their brief -- only arose by reason of the provision of insurance, by reason of the services that we were providing to Grace and --

THE COURT: And did you provide those services, those inspection, hygiene inspection services? You did provide those services under the contract or you did perform those services?

MR. BURGESS: So, we are -- we don't have a record on those issues because parties have cross-moved for summary judgment and we are proceeding on the basis of their allegations in their complaint. And that that is the nature of the claims that they are seeking to develop under state law.

So, we're willing to take on for the purposes of this proceeding that, yes, they made those allegations. But there's just not a record and we don't think it would be appropriate to develop it here given that the parties have cross-moved for summary judgement and we're proceeding on the basis of how they have framed the case.

THE COURT: I was just curious whether you performed the services.

MR. BURGESS: No, sure. I mean as to CNA there's been no sort of state court proceedings. In the plaintiff's briefs they sometimes refer to issues that were developed in

discovery in the litigation against MCC, but that just doesn't pertain to us.

THE COURT: Okay.

MR. BURGESS: If the court would like, I can speak now about the issue of certification or I could also wait --

THE COURT: Why don't you hold off on the certification.

MR. BURGESS: Sure. Sure.

THE COURT: Okay. So should we get Maryland Casualty up here?

MR. LONGOSZ: Your Honor, Ed Longosz on behalf of Maryland Casualty. I think at this juncture, counsel has covered the issues, so rather than I'd like to give time back to the court. And then perhaps later, we'll see how it affects us.

THE COURT: Sure. Absolutely. Thank you.

MR. COHN: Your Honor, may I please the court. I represent the two thousand individuals approximately whose lives have been shattered by asbestos disease. They're referred to as the Montana Plaintiffs but I don't want to lose sight of the fact that we're talking about real people and real suffering.

They have a right to seek justice under state law unless there is a critically important supervening federal interest in preventing that.

And we would respectfully submit that there is no such interest here, that the statue as the Third Circuit has interpreted permits us to proceed on two bases. One is that the claims that are being asserted do not meet the derivative liability requirement and they also don't meet the statutory relationship requirement. And well we should keep in mind that the injunction made by those claims only if both of those tests are met.

Now, the Third Circuit provided us with very specific instructions on how to proceed on remand. The first step is -- well, of course, to determine which state's law applies. But here the parties have stipulated them. Montana law applies.

So, the first step is to determine the elements necessary to make the Montana Plaintiff's claims under Montana law -- the legal element of those claims.

And then the next step is to match those legal elements against the statutory standard. The entire focus of the Third Circuit's instructions here relate to the legal elements of the claims.

I will talk in a few minutes about legally relevant and what that means, but the starting point, the focus, is on the legal elements of the state law claims. That's our starting point and that we see error that was made by Judge Carey the first time around was not to use that as

the starting point, but to deal in generalities instead.

So, with respect to the derivative requirements, Your Honor, the question is not was there some kind of factual similarity between the claims that we're asserting against the insurers and the claims that we're asserting against Grace.

The question is not whether the injury was caused by Grace's asbestos or Grace's wrongdoing or any of those other issues that relate to other claims against other parties.

The question is whether Grace's liability is a legal element of the claim against the insurers. That's how we determine whether there's derivative liability.

Now what that formulation accomplishes that's different from what we argued to the Third Circuit. And the formulation is broader than what we argued. We had argued that in the insurance context, the only situation in which there could be liability or there would be derivative liability would be in the case of the indemnity clause under an insurance policy which says that the insurer agrees to pay the claims of its insureds.

The Third Circuit did broaden that to include right in retrospect is kind of an obvious expansion which is to say but no there could be documents like respondeat superior or piercing the corporate veil or other situations

where an insurer, maybe unlikely to happen in the real world, but an insurer would be being held liable for the wrongdoing of Grace, if Grace was the one who is the actual actor on the scene creating the liability.

So, but that expansion, Your Honor, was -- did not fundamentally change the realities of the world and of asbestos cases as they relate to insurers. And your question about Johns-Manville goes right to that point.

So, in Johns-Manville, the entire focus of the Second Circuit's jurisprudence had to do with whether the claim could be enjoined to be -- was that a claim could be enjoined only to the extent necessary to protect the risk of the bankruptcy estate and the risk is the insurance policy and the insurance policy proceeds.

And it was -- the Second Circuit made it very clear that these asbestos reorganizations depend on insurance policy proceeds as a critical asset. They get distributed. It's supposed to be fairly in accordance with the Chapter 11 plan. And that's why insurers get protected by injunctions. And the injunction to the extent that it goes beyond protecting the risk of the bankruptcy estate the Second Circuit said there was no jurisdiction to do it, bear in mind that was before Section 524(g).

So, the decision was rendered in terms of jurisdiction. But really jurisdiction is the same question.

It's whether there is a supervening federal interest in preventing people from asserting their state law claims.

Now Mr. Giannotto stood up and said, well in Johns-Manville, there's this distinction because Travelers was being sued for not protecting people from somebody else's asbestos. That may be true that Traveler's is being sued. Traveler's is being sued for not protecting people from a lot of people's asbestos, but there were claimants who were exposed to Johns-Manville asbestos. He acknowledged that.

And the Second Circuit was concerned those claims could proceed against an insurer for wrongdoing where those claims had independent basis under state law and would not affect the policy proceeds. And we can all see immediately why that makes perfect sense because since the restructuring, the reorganization purpose that's at issue is to assure that the bankruptcy estate has sole control over insurance policies and their proceeds. What reason could there be beyond that for to protecting insureds.

Now there are, you know, these cases that don't apply here, you know, the respondeat superior cases, the piercing corporate veil, those kinds of things which, as I will demonstrate in a moment, are just plain not applicable here. And that's an expansion that the Third Circuit made and the Second Circuit's concept in Johns-Manville based on the Third Circuit's reading of Section 544(g), the statute.

But that expansion that's is not the situation that we find here in this case. And, to me, it's just an instance of an appellate court doing what appellate courts are supposed to do which is just thinking about future cases, not just the present case.

Now the fact that this court's task is to ascertain -- and this is in the words of the court -- what liability under the relevant law demands has two important implications. One is that you have to look at it on a cause by cause of action basis. There can be both derivative and non-derivative claims held by the same parties against the same defendant.

In fact, this case is an instance of that. The Montana Plaintiffs have claims under the CNA and the MCC insurance policies. The CNA policies, of course, were settled during the bankruptcy. The MCC policies had been settled years before. So, MCC actually did not write a check for one red cent to the bankruptcy. But their policies no longer exist. So, we don't have those claims in actual fact because the claims have gone away.

But we, under the terms of the policy, we have those kinds of indemnification claims and that will be expected. That's the way that the statute is drafted and the way it's been interpreted by the Third Circuit is that yeah you can -- the fact that you have derivative claims doesn't

mean you can't also have non-derivative claims.

And those non-derivative claims almost by definition, it would be for the same injuries, caused by Grace's asbestos and the fact pattern would be similar that was -- it always is joint tortfeasor context. And that's why you have to focus on the legal elements because, otherwise, there's no way of distinguishing between what's a derivative claim and what's a non-derivative claim.

So, the second implication, Your Honor, is that the -- and really, I guess, I already said it is that the discipline of the process -- the way that we have an actual legal standard to apply here as opposed to just some kind of gut instinct about what's, you know, what's derivative and what's not derivative is to actually look at the elements of state law for each cause of action.

So, just discussing the derivative requirements, Your Honor. I'll get to how Montana law applies to that, but let me first stay with the statute for a second and talk about the statutory relationship requirement.

The court said here too it's a purely legal analysis. You start off with the legal elements of the claim. And the question is, is the provision of insurance legally relevant. Is the provision of insurance legally relevant to the Montana Plaintiff's claims?

The question is not whether the provision of

insurance is factual relevant, whether the insurers would not have been involved with Grace's facilities, but for providing insurance. It's not that insurers customarily provide certain kinds of services. It is not that.

It is, is the provision of an insurance to Grace a legal element of the claim against the insurers for negligent provision of industrial hygiene services and for breach of a duty to warn. We're suing, Your Honor, not for provision of insurance, but for provision of industrial hygiene services. Those are the claims that we're starting.

However, the insurers wish to characterize it, those are the claims that we're stating. And we would respectfully submit that under Montana law, we have our claims for damages caused by lack of due care in providing those services.

Now, the court said that similar and, again, I'm quoting. It said,

"Similar to the derivative liability analysis above, the court should examine the elements necessary to make the Montana claims under the applicable law."

And then determine whether providing with a provision of insurance is relevant legally to those elements. Legal relevance is tied to the elements. It's not -- legal relevance is not some abstract concept, whatever may -- there

may be the insurance policy. It's a legal document, therefore, it's legally relevant.

That's not the analysis at all. The legal relevance, the court said this. You have to determine whether provision of insurance is relevant legally to the elements of the claim under Montana law.

Now, the court did not say had to be as Mr. Burgess pointed out, the court did not say it had to be an element of the claim. It said it had to be legally relevant to the elements of the claim. So is that broader? Could that be broader?

Not on the circumstances of this case. And how do we know that? Because of Quigley. The phrase legally relevant comes from Quigley. That's where the Third Circuit got it from. And in Quigley, what legal relevance meant was that the statutory relationship had to be a legal element of the claim against the non-debtor third party.

Quigley, of course, was the case where Pfizer let its subsidiary use its name, put it on its packages and it had apparent manufacturer liability. Absolutely no doubt the reason Pfizer did it was because of the statutory relationship, right. The parent subsidiary.

There's a business rationale for it. I guess those insurers like to go and conduct inspections for their own purposes. Pfizer was all about corporate branding,

wanted its name on all the products in the corporate group. Made perfect sense as a business rationale.

There's absolutely no doubt that Pfizer did it. The reason they do it -- they let the subsidiary engage in the liability generating conduct was because of the parent subsidiary relationship. And yet, Quigley said no that's not what the statue is all about.

What the statute is all about is that the -- your liability is arising because of the use of the name. It's not arising because of the parent subsidiary relationship. The parent subsidiary relationship was not a legal element of the claim.

So, how else do we know it? How else do we know that that's what the court means in this case? Well, there's a fact that the court remanded. The elements that Mr. Burgess and Mr. Giannotti made so articulately just now, they made to the Third Circuit. And the Third Circuit acknowledged it.

In the Third Circuit Opinion, there is reference to the policy, the insurance policy, the insurance policy disclaimer, the fact, the argument that was made about how insurers do this customarily.

If that was what legal elements meant then the Third Circuit would not have remanded. There would have been no need for a remand. What the remand was with specific

instructions. Look at the relevance, the legal relevance of the provision of insurance to the elements of our claims under state law.

And then you might ask well then why use the term legal relevance. Well it was used in Quigley, why reinvent the wheel. But I think the reason is probably that, again, Appellate Courts have to be mindful not just of this case. They have to be mindful of future cases. And legal relevance, you know, could provide some wiggle room in future cases.

You know imagine a case, for example, let's say that the law of the state provided that the limitations period for a certain cause of action is three years. But if asserted against an insurer the cause of action was six years. I think maybe a court would want to be fully consider whether a claim brought in the fourth year, you know, maybe provision of insurance would be legally relevant, even though that wouldn't be an element of the claim.

There are other situations that one could imagine where in a future case, you know, having on different circumstances where the court might think that it was an act of genius, to use the term legal relevance rather than say it had to be a legal element.

But when you look at Quigley and what Quigley did and how Quigley used the term legal relevance and you realize

that the Third Circuit was very plainly endorsing the Quigley methodology, there is no doubt that in this case under these circumstances, the court, the Third Circuit is telling this court that provision of insurance would need to be a legal element of the Montana Plaintiff's claims against the insurers.

And by negative implication I think that my adversaries here have conceded that it's not that. It is not a legal element of the claims against them. Those claims are, as they outlined, I mean they add this claim under Section 324(a), but the basic claims are for negligent performance of industrial hygiene services, not a provision of insurance, Your Honor; negligent performance of industrial hygiene services.

And there Montana law is clear that there simply needs to be a -- that there needs to be the performance of professional services under circumstances where is foreseeable that a third-party would be injured if those services were not performed with due care.

And does there have to be a contract? You know, you have the subcontractor cases, Your Honor, where you had a subcontractor who's held liable to another subcontractor. No contractual relationship between them, but there was a contract between the defendant subcontractor and the general contractor.

And my (indiscernible) we tried to analogize that to contract between the insurers and Grace and let's see (indiscernible), Your Honor. It doesn't matter because what the Supreme Court of Montana has said on multiple occasions is that that contract is just an incidental fact. It's background.

What's important and what gives rise to the liability is the rendering of professional services under circumstances where it's foreseeable that specified third parties or a class of third parties would be injured if those services were not performed with due care.

And the reason we know that the Supreme Court of Montana is serious about that is the Kent case -- Kent vs. Columbia Falls where there is no contract. And, yet, there was the negligent performance of engineering services.

Your Honor, I don't know if you recall, but that was the case where the -- where engineers for the city of Columbia Falls -- well the straddling point was there was a separation there was a subdivision. The subdivision required for city approval. The City Engineers could have just gone out and inspected it and stamped approved or disapproved, but they didn't do that.

They went --

THE COURT: Were these the steps in the library? Was that the case about -- well --

MR. COHN: No.

THE COURT: I get your point, though, about the services. I understand your argument about that.

MR. COHN: Yeah. Well, Your Honor, you know this was the case where it was a subdivision approval and these were these trails in the subdivision. And somebody was using the trails, got injured and sued the city on the basis of its engineering services.

And the court said well yeah, the city had gone out and not just, you know, done the stamping, you know stamping approved or disapproved on the subdivision plans. The City Engineers actually had gone out and participated in the designing of the trails.

And based on that, based on that negligent provision of the engineering services under circumstances where it was foreseeable, the people would use the trails and could get injured, the Supreme Court of Montana said that's enough for liability for lack of due care in the performance of professional services.

And so, here where the insurers perform professional services. They had engineers, they had doctors, they had industrial hygienists on site, it was enough. And it doesn't matter whether those services were performed under contract or gratuitously or whatever. That's not what gives rise to liability.

THE COURT: I think we all agree that Montana law doesn't require privity. The way that I read Montana law is that if you provide services under a contract and its foreseeable that certain third-parties may be injured, that a duty arises under Montana law, whether it's under Montana common law or under the restatement.

You know when I read your briefs, you know, they sound (indiscernible) and I understand your point that they've already made the argument that the restatement applies. I wasn't really sure about the distinctions between the cases that you were specifically relying upon and the restatement. They seemed pretty clear to me.

If you perform services and there is some foreseeable harm that could occur to a third party then a duty arises under Montana law. That's generally what I think that Montana law holds.

MR. COHN: Right. Yes. And I think the parties agree on that. The difference, Your Honor, is that the insurers emphasize that there has to be a contract under which it performed. And then they say well the contract --

THE COURT: I thought the argument was, you know, that the services were only provided because there was a contract. If there was no insurance contract, the services wouldn't be provided, so.

MR. COHN: Yes. And that's the exact kind of

thing that the Montana Supreme Court has said, yeah that's just a background fact. It's not an element of liability. And not only that, but the services could be performed gratuitously. Even Section 324(a) what the restatement says, services could be performed gratuitously. So, the contract is not an essential element -- I mean it's not a legal element of the cause of action.

So, the next argument that they make is well but wait. There has to be a risk that the person is -- well on the duty to warn side there'd have to be something that had to warn and I'll get to that in a second.

But on the negligent side of things what we're asserting, Your Honor, is not that the insurer has just arrived on the scene and we're just kind of passively observed that there was a hazard at the premises. If you had occasion to read that asbestos court decision, Your Honor, what you saw was that MCC was there day in and day out pervasively involved with engineering issues at the plant with the (indiscernible) to the plant.

I mean they were designing signs for warnings, you know. That drain is dangerous or, you know, watch out for that window or whatever. But they didn't create a sign saying that the levels of asbestos dust in the air are harmful, use a respirator.

So, we're talking about the pervasive provision of

industrial hygiene services as being the basis for liability. And that goes well beyond anything that of the insurance contract requires and, in any event, as noted.

The existence of a contract has nothing to do with the basis for liability. The basis for liability is if you're going to go in there don't have to, but if you're going to go in there and provide professional services and the professional services are the type that deal with safety and it's foreseeable that if you don't use a duty of care that certain people will be injured then you're liable to those people. And you also under Montana law have a duty to warn those people.

Now I want to discuss -- I want to focus specifically on duty to warn under Montana law because an important difference in our position in that voice by the insurers has to do with blaming Grace for the creation of the unsafe conditions and saying that that is relevant either to derivative liability or to the provision of insurance.

And the importance of the duty to warn, the duty to warn under Montana law is not simply that if you walk past a pothole and it looks dangerous or whatever and you don't issue a warning that you have liability. That's not how it works.

It's that you have to so engage with a hazardous situation so as to create an expectation that you would

provide a warning. You did not, however, have to create the hazardous. You just had to engage with it sufficiently so that you should be held responsible under the law.

Now in this case and so roughly if we were looking at a situation where the hazard was simply created by Grace and the insurers had no role whatsoever in that, there could still be a duty to warn just by reason of the pervasive activities that I just described of the insurers engaging with the hazard.

But what I want to emphasize here, Your Honor, and that's the importance of the knife wielding terrorist that my brother, Mr. Burgess, liked so much. The plea here is that asbestos is just a contact. It is -- in this context these were not -- this was not asbestos -- this was not an asbestos product that was being produced at the Grace facility. This was a non-asbestos insulation, at least it was supposed to be. And the problem was at the vermiculite, which was the material that they wanted to use, was contaminated by a vein of asbestos.

And so, when you then processed it at the plant, it gave rise to levels of asbestos dust. Well that's, you know, that's the kind of hazard that exists at industrial companies all over the country. You know, you either create as a byproduct of the manufacturing process or you're just dealing with an already existing contaminate and it has to be

controlled.

And there are, and we cite in our brief, there are safe levels of asbestos. There also happen to be vermiculite lines that don't have asbestos in them but when they have asbestos in them, you have to deal with it. And that was the situation that Grace faced.

So, Grace -- you know, there's no doubt that Grace failed to do it that's why our clients are sick. But the insurers themselves in this case also created the hazard. They created it by their (indiscernible) of actions of going onsite and of developing the safety measures that were insufficient. They engaged with the hazard not only sufficiently to have a duty to warn, but they engaged sufficiently that they themselves are responsible for the negligent provision of industrial hygiene services. And that's our cause of action.

I mean a jury will either accept it or not accept it. You can obviously tell from the asbestos court's decision on summary judgment that the asbestos court was impressed with the robustness of the record on this subject. But ultimately, it's going to be up to a jury to determine whether there's liability, but that's the theory that we're asserting and it's a valid theory under Montana law, and we should be permitted to go forward because it has directly to do with the actions of the insurers.

It is -- and it is in that sense, it is not derivative. When we look at those -- we heard reference to the Gas case and the other ones that were cited in that footnote. There may be a quest whether in the situation where let's say you negligently hire an employee or negligently supervise an employee, then the employee goes out and does something that generates liability for you.

Okay so there are three causes of action, right. There's just respondeat superior. You're just responsible for what your employee did. You negligently hired him. You negligently supervised him. I mean and it may be at those last two like conceivably be considered derivative, but that's not the point here because in each of those situations where you're talking about liability, there is, I'll call it, an active party and then the non-active party. And the quest is whether the non-active party is derivatively liable for the active party's actions.

Here, and so it is -- are the insurers liable as non-active parties for Grace's actions as an active party? That's not what we're asserting, Your Honor. We're not asserting that the insurers are liable for what Grace did. It's actually all the reverse. It's that we're saying that they were the active parties, that they were actively involved with provision of industrial hygiene services, that they didn't recommend adequate levels of protection of the

workers from dust control.

It may even be that Grace has claims against the insurers in their capacity as industrial hygiene professionals because if Grace relied on them to have fixed up a, you know, problem that existed at the plant or would have prevented a problem from arising, but the point is that this is not -- all the situations that you look at where there is any possibility of interpreting that footnote in the Third Circuit opinion as saying, oh yeah that's derivative liability, all of those involved a non-active party that didn't actually do the stuff that generated liability.

And, here, we are saying the insurers did the stuff that generated liability. And when they say, oh yeah, but Grace did it. Grace primarily did it or Grace did it too, what that really amounts to is the precise argument that the Third Circuit opinion rejects which is that and when they say, oh yeah, but Grace did it, or Grace primarily did it, or Grace did it too, what that really amounts to is the precise argument that the Third Circuit opinion rejects which is that it's dispositive that Grace's asbestos caused the injury. It's presumed this is an asbestos Chapter 11 case, Your Honor. The reason Grace is in bankruptcy is because it has asbestos claims against it.

Grace as, obviously, dealing with asbestos. That's the background. That's the situation that we're all

dealing with here. And the Third Circuit made it clear that the fact that that's all true and that Grace was actively involved with asbestos and generating asbestos is not what is at issue here.

What is at issue is what, are the elements of the cause of action against the third-party. And we would respectfully submit that we have, that our causes of action are for actions that they undertook; not a position, or a capacity or something else having to do that makes them liable for what Grace did, but rather we're suing them for their own actions. And of course that cause of action must exist under Montana law. We provided lots of authority why we think it does. And if there is any question about that we'll talk about it in the context of certification.

We have alleged causes of action based on the actual actions and activities of these insurers. And based on that it's not derivative of Grace's liability. And because its industrial hygiene services, professional services, not -- it's not the provision of insurance. Provision of insurance is not a legal element of those claims and, therefore, it doesn't meet either the derivative, statutory requirement or the -- I'm sorry, either the derivative liability, the requirement or the statutory relationship requirement.

THE COURT: Thank you.

MR. COHN: Thank you, Your Honor.

THE COURT: Did you want to respond to his comments before I ask my questions?

MR. BURGESS: Sure.

THE COURT: Okay.

MR. BURGESS: So, a few brief points in response.

THE COURT: Okay.

MR. BURGESS: One is that, as far as I -- I started out by pointing out that the Third Circuit clearly excluded a test that produces a result that only insurance policy proceeds are going to be covered. And as far as I understand my friend's argument I think his position is, ultimately, yes, in this context it's going to be just limited to insurance policy proceeds. Certainly, there was no indication of another potential cause of action that could allow it to sweep more broadly.

He suggests that, well, we argue something broader before the Third Circuit. They rejected our broader proposition, but now we're making a different test that it's based on the legal elements. I don't think that's correct in terms of how it was briefed. As we noted in our reply brief, on Page 3, in the Third Circuit they specifically linked the legal elements test to producing result that it is tied to only insurance policy proceeds.

Judge Carey at, I believe, Pages 14 and 15 of his

underlying opinion also linked those two parts together. So, as I understand their position it's that even though the Third Circuit categorically made clear that it's not going to be limited to insurance policy proceeds they nevertheless, *sub silentio*, adopted a test that is going to dictate that result. We just don't think that is a plausible way to read the Third Circuit's opinion.

Mr. Cohn did say in, sort of, discussing the Dodds, and the Gas and other cases, I'm not sure if there's a qualification on that position or just an argument he's making in the alternative that, well, okay, maybe those claims which clearly could extend broadly maybe they would be derivative. He drew a distinction between a non-active party and an active party in the, sort of, Gas situation and claims being brought against the employer for negligently supervising the independent contractor who then, in turn, creates a harm.

So, I guess in his formulation the employer would be the non-active party and the independent contractor would be the active party. He says, well, maybe that is derivative. I think we actually agree with that formulation in terms of the non-active party versus the active party, but it is just crystal clear when reviewing the actual Montana plaintiff complaints that we are the non-active party in this assertion. All the dangers are being created by Grace.

The notion -- he uses the term affirmative conduct, but it's not a situation where we went in, in doing our inspections, and created some additional risk, created a risk that would exist over and above what existing was based on Grace's operations and its wrongful conduct in failing to control asbestos.

The allegations consist entirely of things we allegedly failed to do to update the risk that someone else had created. So, I think under his formulation, in terms of what an active party and a non-active party, we have to be understood as the non-active party. The point about why we are active is just, well, we're alleging that you assumed this duty and you, yourself engaged in some negligence and by virtue of that negligence you were unable to abate a harm that existed that you were obliged to do.

I think that is just another way of arguing that to the extent the insurer is being held partially responsible for its own wrongdoing that that can't be derivative. Again, that is exactly what the Third Circuit excluded in its decision.

On the legal relevance and the provision of insurance prong my friend, Mr. Cohn, notes that the court did not, in fact, state that legal relevance is going to be the same thing as an element, but then I think as he, sort of, applied it, and by reference Quigley, the view is that

actually that's all its going to be. Again, I don't think that is a good way to read the opinion because not only did legal relevance come from Quigley -- and I do want to talk a little bit about why we think Quigley is distinguishable on this issue, but not only did it come from Quigley, but Judge Carey used it as the underlying test in his decision.

And this court did not suggest he got the relevant test wrong as to the statutory relationship. Did say he got it wrong on the derivative requirement because he treated the roll-up Grace asbestos in causing the injury as dispositive for derivative. That was wrong. But as to the statutory relationship and legal relevance the court accepted that his assumption that legal relevance was the governing test even in its Footnote 8, sort of, suggested it doesn't appear there is any dispute between the parties between what the relevant legal standard would be because while, you know, CNA's test has been characterized as being a but for test. In fact, that is not so. They're saying given that these (indiscernible) were part and parcel of the provision of insurance and were the predicate for the duty under State Law, certainly that is the kind of thing that would qualify as legal relevance.

So, Mr. Cohn asked, well, why the remand then because that would be pretty simple. I think the reason is because the court -- you know, Judge Carey had proceeded

under the assumption that 324(a) would apply and that legal relevance with the assessed on the basis of that, sort of, cause of action. Their point is there's not a free floating common law that the court, the Federal Court can just, sort of, adopt. We're doing this by reference to a particular State Law. We need to identify what State Law applies. We don't know if that state has adopted 324(a) of the restatement that the court pointed that out specifically in Footnote 9 of its opinion.

So, while we don't quarrel with the, sort of, assessment of what legal relevance could be, we're not equipped to, sort of, evaluate whether it is legally relevant to the actual cause of action. You have to first identify what the choice of law is and what the elements are under that State Law, but then in doing the inquiry you are determining whether it is legally relevant to the elements, not whether it is, in fact, an element of the claim. Mr. Cohn, I don't think, can identify any sort of situation here in which those wouldn't be one in the same.

As to Quigley, so a couple responses on that. The underlying -- so, there the, sort of, statutory relationship was the corporate relationship between a parent and a subsidiary and, you know, the relevant cause of action was being an apparent manufacturer under the restatement.

Mr. Cohn makes various arguments about the

inherent connection between a parent and a subsidiary and how it would follow naturally as a matter of business logic for the parent to put its name on a subsidiaries products, but none of that was developed in Quigley. None of those, sort of, arguments were made. That was not -- there is no, sort of, consideration of whether ownership by itself would, sort of, give rise to this or really what is triggering the duty is just Pfizer decided in its discretion, and maybe ownership is what gave it the ability to do this, but to put its name on the product. That need not be connected intrinsically to ownership.

By contrast, here, we have identified authority after authority that says this is just what you do in providing insurance. It's not just the contract of the agreement to indemnify. Part and parcel of providing insurance is to engage in inspections to determine your level of risk and to provide recommendations to the insured in order to try to mitigate that risk. That is part of what it means to provide insurance. So, we think the link is much stronger here then it was in the Quigley situation and that, indeed, it wasn't that, sort of, argument and in any event wasn't developed in Quigley.

Another point I wanted to make about Quigley and, sort of, its reference to the Johns-Manville line of decision on the derivative issue. I think it's important to note that

Quigley did not reach the question of whether the parent manufacturer claim was derivative. So --

THE COURT: But it sort of suggested that it was non-derivative. I mean that's why it undertook the entire analysis of Johns-Manville cases because the plaintiffs on appeal to the Second Circuit were saying, Judges, these are non-derivative claims; therefore, you don't have jurisdiction.

MR. BURGESS: Right.

THE COURT: Quigley clarified that jurisdiction is a separate inquiry then derivative, non-derivative analysis and that jurisdiction is a broader analysis. And in that case because the parent and the sub shared the same insurance it clearly had an impact on the estate.

I think it would not have gone to such great lengths to distinguish all the Johns-Manville cases about the derivative issue if they had found -- I mean, I thought that they, sort of, implied that it was non-derivative litigation which is why they were trying to distinguish it on the jurisdiction question.

MR. BURGESS: I mean, I agree if they had found that it was --

THE COURT: They didn't specifically make the finding that the litigation was non-derivative, but that, sort of, was the implication.

MR. BURGESS: I guess I don't read it that way. I mean, I think there were two different paths to that result and one of them would have been to say even if it is non-derivative jurisdiction is broader and that's what they, in fact, held. Another would have been to say its derivative as to which would be more complicated. Derivative, sort of, would be imbedded in an issue of Pennsylvania Law that maybe the Second Circuit didn't feel as inclined to opine on. I'm not even sure if Pennsylvania, for example, would take certification from the Second Circuit.

Whatever was, sort of, driving that Second Circuit three judge panel, which I think is hard to discern, certainly the Third Circuit's endorsement of aspects of Quigley I don't think can extend to an implication that the four hundred, the apparent manufacturer claim would necessarily be non-derivative given that the court didn't even -- the Second Circuit didn't explicitly reach that issue.

I think that suggestion that that would necessarily be non-derivative is hard to reconcile with the things the Third Circuit did say in identifying Gas and Dodds which clearly are instances in which, notwithstanding it being a claim that could be characterized as direct liability because it is predicated, in part, on something that the defendant, itself, did. It nonetheless is putting those as

potential examples of something that would be derivative in the relevant sense under 524(g).

The only other comment I wanted to make, and then Mr. Longosz, I don't know if he has any points he wants to address in terms of the State Court litigation or the MCC. There were lots of references in Mr. Cohn's argument to the asbestos court litigation and supposed evidence that's been unearthed.

THE COURT: I'm not going to consider that.

MR. BURGESS: Right. So, that was the only point I wanted to make. Thank you, Your Honor.

My colleague apprised me of another point I might want to make.

THE COURT: Sure.

MR. BURGESS: Just in terms of, sort of, understanding the nature of the cause of actions that are asserted under State Law, and this is a point I was trying to drive at in the characterization Mr. Cohn gave between active and non-active participant.

For example, in their failure to WARN claim, I think it's particularly stark. The nature of the cause of action is that we, as a Worker's Compensation insurer, and that was, sort of, embedded in the test that the asbestos court gave that we, as a Worker's Compensation insurer, became aware of a risk that a serious hazard that existed.

We think that has to be the quintessential example of what would be derivative.

While the allegation is that we breached a duty, it's a duty that we acquired solely by virtue of their creating a risk in failing to prevent it or warn against it which we think is different from a potential claim that -- I mean you can imagine a hypothetical example in which we are engaged in industrial hygiene services or other things that we would say arise by reason of the provision of insurance, but nonetheless aren't derivative because, you know, we knock something down in the plant and that led to a release of additional asbestos.

There, it is a risk that we created. I think that has to be contrasted with a risk that is -- the claim is that, well, we didn't adequately take measures to mitigate or to warn people about or to prevent it. This is a difference that is fundamental to, sort of, 324(a) about whether we are doing something to make things worse than they, otherwise, would have been but for our involvement at all or it's something that the claim is, well, you know, there was a harm here that someone -- a risk that someone else is creating. By our actions we didn't take measure that could have adequately prevented it. We think that has to be a fundamental distinction between whether something is going to qualify as derivative or non-derivative.

MR. LONGOSZ: Good morning, again, Your Honor.

THE COURT: Good morning.

MR. LONGOSZ: If I may just have a few minutes.

THE COURT: Sure.

MR. LONGOSZ: I take from the court's comments that the court is not going to get into the subtleties or the point, counterpoint of the State Court action. I don't want the court to take away from this by virtue of my silence or not, not addressing some of these points that we necessarily agree. I think there is a lot of disagreement.

The one thing, though, I think is important for the court to understand to know, if it doesn't already, that the underlying case or, at least, the HUD case. Two things occurred. We were two weeks before trial. The Supreme Court of Montana decided to vacate the trial date and except the writ of supervisory control which is tantamount to assert petition to decide this issue. We had full briefing on it.

The issue of whether this foreseeability and duty analysis is what Montana is going to follow or whether 324(a) is what Montana is going to follow. We do have argument on that August 14th in the Supreme Court of Montana. So, I think with respect to any guidance that that may afford or provide for this court regarding the specifics of what framework is followed and how Maryland Casualty or any of the insurers may be judged relative to that framework it will

provide some definition to it.

So, the issue is teed up and framed in the Montana Supreme Court. So, from that standpoint -- the other thing is there was a mention made of, for example, the Kent [phonetic] decision and a lot of other cases. One of the reasons that we believe that the Montana Supreme Court is going to look t this is because it hasn't looked at 324(a) in any kind of wholesome way. It's looked at the restatement, restatement 323 and it has mentioned 324.

There is a Federal Court in Montana in the Austringer [phonetic] case that specifically said sitting as a Federal Court looking at Montana State Law it's my belief, as the Federal District Court Judge, that Montana State Court would follow a 324(a) analysis. And then looking at it under the lens of the prism of 324(a). That materially effects specifically what occurs relative to whether its Maryland Casualty or any other insurer specifically because in this case and in these cases Maryland Casualty as well as other insurers fully provided, and in this case, Worker's Compensation Insurance.

That is all the services that were provided. There was no un-bundled service. So, in other words there was no separate service to do these industrial hygiene inspections or industrial hygiene professional services. That contrasted with these cases, like a Kent case and all

these other cases in Montana that talk about a professional services contract to do a particular type of service.

The other thing is that the Kent case is interesting because it was a statutory requirement. That was a statutory case where statutory engineers went out and conducted their engineering studies and worked on that case. As the court is probably aware, in looking at that case, it's totally different then the circumstances we're dealing with here.

So, there are subtleties to this. There are subtleties to what occurred and didn't occur relative to this, but I think the factor permeating all this is that it arose out of insurance provided to the W.R. Grace and but for that insurance and but for W.R. Grace's actions, as Mr. Burgess talked about, we wouldn't be here today.

The irony -- I would just close with this, the irony of this all is, and we talk about Johns-Manville, as it turns out, and this is, sort of, a side note, but I think an important one to understand the context is that Grace reached out to Johns-Manville for advice and to ask them how to do an industrial hygiene program in their facility unbeknownst to C&A, unbeknownst to Maryland Casualty, unbeknownst to anybody else. So, the reach-out was there.

It seems like Johns-Manville seems to haunt all of us no matter coming and going in this, but I thought that

that was an anecdote to provide information, but important information just to show that Grace was on its own, doing its own thing and working its own asbestos mine. And to the extent the insurers did anything it was provided insurance, provided Worker's Comp Insurance and it was Grace's facility, its asbestos that caused us to be here and the harm that was caused.

Again, as we go along if the court has any questions I'm happy to answer.

THE COURT: Thank you.

MR. LONGOSZ: Thank you.

THE COURT: Do you feel the need to respond to any of that?

MR. COHN: Yes, just very briefly. Your Honor, first of all, that last anecdote, while entertaining, appears nowhere in the record and I don't think --

THE COURT: I'm not going to put it in my opinion. Don't worry.

MR. COHN: I did want to just go back to a couple of things that Mr. Burgess said at the very end which is he talked about the case in Montana against Maryland Casualty things they did as a Worker's Compensation insurer. I really just wanted to remind the court that in that case, because of Judge Carey's decision that permits Montana plaintiffs to sue Maryland Casualty on the basis of its conduct as a Worker's

Compensation insurer that is a totally different situation from what we face here on the issue of meeting the statutory standard. We don't need to meet the statutory standard because the injunction doesn't even apply to Maryland casualty as a Worker's Compensation insurer. So, I just want to make sure the record is clear on that.

The second thing I wanted to return to was, you know, Mr. Burgess made a very telling point at the end. He was talking about, you know, it would be one thing if we were on the premises and we created some new problem, you know, we kicked over a barrel of, you know, asbestos dust or something and it made it worse, but actually we were just there and the problem already existed. That is another way of saying what they have been saying all along which is Grace's asbestos caused a problem and that's all that this court should focus on.

Our allegations are that Maryland Casualty and C&A engaged in highly specific pervasive conduct in dealing with the asbestos situation, had the opportunity to recommend an industrial hygiene program that would have solved the problem, failed to do so and failed to do the alternative thing that would have solved the problem which is to put up warning signs saying there are harmful levels of asbestos dust, be warned.

Thank you, Your Honor.

THE COURT: You're welcome.

Okay. So, the way that I see the Third Circuit opinion is it lays out Quigley as the framework upon which it bases its analysis. It tells me that I must look at State Law and it uses Quigley as a basis to do so.

When I look at Quigley, Quigley didn't actually make any determination about whether the litigation was derivative or non-derivative, but what Quigley did do was it made the distinction that satisfying this derivative, non-derivative analysis is not a necessary requirement to resolve jurisdiction. It's not an independent requirement that folks have to satisfy. And in order to demonstrate that it took a thorough analysis of three of the Johns-Manville cases; the MacArthur case, Manville III and Manville IV.

It used those cases to try to clarify to the parties that the derivative, non-derivative inquiry is not a separate jurisdictional hurdle that parties must overcome, that jurisdiction is a broad question of whether or not there is a potential impact to the estate. So, after going a great length through all of that found that there was jurisdiction because of the shared insurance between the parent and the sub. Then on the 524 analysis it didn't even get to the derivative portion of it because it found with regard to the statutory relationship it resolved that in favor of the plaintiffs in that case.

So, when I look at the Quigley case, you know, it begs the question when I look at the Third Circuit case what does it mean to have derivative liability in the context of asbestos bankruptcies; it's a very specific meaning. And the Third Circuit is relying upon the Second Circuit's test and the state test was not something laid out in Quigley, per say, it was Quigley that referenced the three Johns-Manville cases.

I think it's important for us to take a journey and just revisit the Johns-Manville cases one more time so that you can understand what my questions are and what my concerns are.

You know, the Johns-Manville case is an important case not only because it was cited in Quigley and set out the State Law, which the Third Circuit used, but Johns-Manville, obviously, was the basis of the formation of Section 524(g). So, it's a very important case to understand.

I understand -- just not to make it too painstaking, but I just want to lay out my understanding of what happened in Johns-Manville to make sure that I understand how that applies to this case.

In Johns-Manville you had a debtor who manufactured asbestos for decades and had Travelers act as its primary insurer. And at the time of the bankruptcy Johns-Manville was facing tens of thousands of litigation

from these parties who were injured by asbestos. And when it entered bankrutcy the insurance policies were the most valuable asset that Johns-Manville had.

So, as a result the Bankruptcy Court, understandably, wanted to put a value on these insurance policies, but at the time the insurance companies were engaged in huge litigation with the debtors. They were not going to just turn over the policy limits to Johns-Manville. They were engaged in extensive litigation. And the bankruptcy judge came up with an ingenious solution to solve that problem which was to say, okay, we need to get settlement of the insurance policies.

So, in order to induce the insurers to contribute, I don't know, $770 million dollars we're going to give them something. We're going to tell them that in exchange for giving us this pot of money that we're going to put into a trust to cover claims of people who have been injured by Johns-Manville's asbestos, we're going to give you an injunction. We're going to make sure that no one can sue. Not only are the people not allowed to sue Johns-Manville they cannot sue the insurance company because you guys just contributed hundreds of millions of dollars.

I need to just -- we're just going to go through this thoroughly so that you understand all of this.

So, I'm going to take some quotes now from the

Travelers Indemnity Company v. Bailey, the Supreme Court case that reversed Manville III. And I'm also going to draw from Manville IV as well.

So, in the Johns-Manville case when the settlement was entered into by the debtor with the insurance companies there was a settlement agreement that was executed. And the term that was used was "palsy claims" and it was a very, very broad term that basically said that any kind of claims that are arising out of or relating to any of the policies. It was a very, very broad claim, but the parties had a very clear understanding of what they were trying to say.

So, just hold on while I find all of the references here that I want to raise.

So, at the time that the insurance companies and the debtor entered into this settlement they filed the settlement agreement and then began two years' worth of negotiations on a settlement agreement. As part of this the debtors made certain statements. And I just want to make sure that I find the statements completely.

It's just going to take me one moment to find all of the language here.

Well, essentially, Manville and its insurers made certain statements in support of their settlement agreement. They basically said that we understand, that the injunction that we seek to have to protect the insurance companies and

us it relates to the insurance policies, to the rates. And when they raised these statements there were objections filed. And there was an objection filed by one of the committees in the case.

Okay. I swear I just had that. Hold on. I'm sorry. I have all this stuff. I have all these papers to look at. Okay. Right.

So, just to back up; in Manville -- I am now quoting from the decent in Bailey which just talked about the underlying background. There Travelers -- in Manville's memorandum in support of the insurance settlement agreement it clarified that it did not seek to have the Bankruptcy Court release its settling insurers from claims by third-parties based on the insurers own tortious misconduct towards a third-party, but rather sought only to release the insurers from the rights Manville might, itself, have against them or rights derivative of Manville's rights under the policies being compromised and settled.

This understanding reflected not only the basis fact that the settlement was between Manville and its insurers, and not third-parties, but also the parties knowledge that the Second Circuit had held that the Bankruptcy Courts lack power to discharge independent claims of third-parties against non-debtors.

Travelers even agreed with this. Travelers

similarly acknowledged the limits of the Bankruptcy Courts power noting that,

> "The court has in rem jurisdiction over the policies and thus the power to enter appropriate orders to protect that jurisdiction. It is stated that the injunction is intended only to restrain claims against the rates, the policies which are or may be asserted against the settling insurers even though a legal representative of the Bankruptcy Court noted that all parties seemed to agree that any injunction, channeling order and release is limited to this court's jurisdiction over the rates."

Okay. Then we have the committee who filed a specific objection. Okay. Then the committee of asbestos related litigants and/or creditors challenged the definition of policy claims of that 1984 settlement agreement and they said the settling insurer's breach of covenant of good faith and fair dealing, and consumer protection statutes clearly arise out of or relate to the policies which was that broad policy claim definition. But these claims are not direct actions for proceeds. They are independent third-party claims against the settling insurers which are not derivative of Manville's right.

The Manville estate never has or can ever have any

right in these claim proceeds for they are not contractual. They are personal rights which the victims have for the tortious conduct of the settling insurers. In support of the contention the committee asserted that it is well-established that the bankruptcy court has no jurisdiction to grant the discharge of any injunction of and injunction against these independent non-derivative claims as the settlement agreement requires.

In response to these and other objections to the settlement the parties executed a letter agreement on June 3rd, 1985 which indicated that it was to operate as an amendment to the 1984 settlement agreement. One portion of the letter agreement stated the court has in rem jurisdiction over the policies and, thus, the power to enter appropriate orders to protect that jurisdiction. The channeling order is intended only to channel claims against the race of the Manville estate to the settlement fund and the injunction is intended only to restrain claims against the race, i.e. the policies, which are or may be asserted against the settling insurers.

The letters were executed by Travelers counsel and indicated that the forgoing is confirmed on behalf of the Travelers Indemnity Company and each of its affiliates. After hearings the Bankruptcy Court entered an order on September 26th, 1985 that approved, pursuant to Rule 9019 of

the Rules of Bankruptcy Procedure, the 1984 insurance settlement agreement together with the June 3rd, 1985 letter agreement.

Fast-forward to 1986, there was a settlement order entered in 1986 and a confirmation order entered in 1986, and it still had the broad language of policy claims, but it didn't specifically talk about the parties understanding of what types of litigation it covered or didn't cover.

So, then you have MacArthur. You have MacArthur who was a distributor of Johns-Manville's products and it had a vendor endorsement on Johns-Manville's insurance policies. It argued that it was covered for any kind of liability that it faced based upon the sale of Johns-Manville's products. That it had that vendor endorsement and it was entitled to place a claim against that insurance policy against Travelers. And it argued to the Bankruptcy Court that the Bankruptcy Court did not have jurisdiction to enjoin its litigation, its claims against the insurer, which the settlement agreement was going to stop, because it had independent claims. It had the right to do it and the Bankruptcy Court had no jurisdiction to stop them from doing that.

So, the Bankruptcy Court looked at it, the District Court looked at it and ultimately the Second Circuit looked at it and it said, well, the vendor endorsement claims

that MacArthur has are related strictly to the policy. It's subject to the policy limits. It's based upon the conduct of Johns-Manville. No one was alleging any kind of conduct that MacArthur had done something wrong as a distributor. It was just, you know, selling products of Johns-Manville.

So, it said that because the claim that MacArthur was seeking to file against the insurer was related to solely conduct of Johns-Manville and only related to policy proceeds because if they won in their litigation they would have a claim against the Johns-Manville insurance policies. That is clearly property of the estate and that the conduct and the property that you're trying to get that is a derivative analysis and we're saying that because it was the debtor's conduct and these are assets of the estate this is derivative litigation and you're just like all the other personal injury asbestos claimants.

So, as a result of that the Bankruptcy Court was entirely within its rights and had jurisdiction to bar these types of claims. So, those vendor endorsement claims, those are derivative claims. It's helpful for me to understand what the Second Circuit thinks are derivative claims and what are non-derivative claims. Those are derivative claims.

Then, after MacArthur was issued twenty-six independent actions were then filed in four different states across the country only against the insurance companies. And

as a result of these twenty-six lawsuits Travelers filed a motion or an adversary proceeding in the Johns-Manville case seeking to enjoin that litigation, stop it. And the Bankruptcy Court made its holdings, the District Court made its holdings and then the Second Circuit got a hold of it.

Well, first, I guess what the Bankruptcy Court did was it said let's do this, let's try to settle it and he got former Governor Cuomo to mediate these issues. Cuomo was involved and Cuomo got this wonderful settlement agreement together. He got almost $500 million dollars of additional proceeds from Travelers to kick-in to pay-off these lawsuits. And there were all different types of claims. There were statutory claims, common law claims and the settlement agreement was executed by Travelers.

Some of the -- not everyone agreed to settle, but many of them agreed to settle and they had the settlement agreement. And as part of that it required the Bankruptcy Court to enter a clarifying order stating that the Bankruptcy Court called these twenty-six independent actions, direct actions even though they're not your typical direct actions against insurance companies, but, you know, they were actions that were filed directly against the insurance companies.

The clarifying order said that all of the twenty-six actions were enjoined by the 1986 settlement order that we previously entered and, therefore, we're going to allow

Travelers to kick-in this $455 million dollars and in exchange we're giving this clarifying order saying that all this litigation now has to stop. It was never allowed to proceed. It was covered by the 1986 settlement orders. It should have been enjoined from way back then.

So, when they did that it went up on appeal to the District Court and, ultimately, to the Second Circuit. The Second Circuit did a number of things. It said, well, we have to figure out whether or not this litigation is derivative or non-derivative. And in order to do that it didn't just lump all the twenty-six claims into one barrel. It said we need to look at each and every single one of these. And when it looked at each and every single one of these it had -- there was, I think, three different that they specifically looked at.

The first one that they looked at was under the West Virginia Unfair Trade Practices Act. There they said that those claims were based upon this act and although that act, itself, does not provide for damages for violation of its provisions the Supreme Court of Appeals of West Virginia has identified the types of damages recoverable under the act as including attorney's fees and even punitive damages. Moreover, it is clear under West Virginia Law that settlement of the underlying tort case against the tortfeasor does not preclude a separate and independent recovery against a

tortfeasor's insurer arising out of its alleged bad faith insurance practices.

Thus, it is evident that plaintiff's direct action claims constitute independent tort claims. They were talking about the West Virginia claims. So, these are independent tort claims. These are non-derivative claims.

It also gave an example of what would be a derivative claim. And it looked at the claims that were referenced in Davis. Davis was a Louisiana case where the actual statute allows a third-party to sue an insurer directly when an insurer is bankrupt. That is a direct action case.

So, some of the claims here, in Johns-Manville, were, obviously -- those were the types of claims that they had. They are premised on the statute that provides a direct action against the insurer when the insurer is insolvent. The recovery is against the policy and is, thus, limited to the coverage of the policy. These were the types of claims in play in Davis and, in our view, Davis was correctly decided. To the extent the clarifying order limits claims based on that Louisiana statute the order is on sound jurisdictional ground. That is -- those are derivative claims.

Then they talked about the vast majority of the claims in the instant litigation and they analogize them to

the Fifth Circuit case Matter of Zale Corp. There you had an insurance company who insured the debtor and then there was an excess insurance provider and the excess insurance provider wanted to sue the direct insurer. And in that case they were raising different types of claims such as bad faith tort claims and those claims were considered independent claims. As a result of those independent claims those were deemed by the court to be non-derivative claims.

So, I think that, basically, the Second Circuit then said that most of the plaintiffs in Johns-Manville were plaintiffs who were seeking to recover directly from a debtor's insurer for the insurer's own independent wrongdoing. They were pursuing assets of Travelers only, not of the debtor's assets. They raise no claims against Manville's insurance coverage. Therefore, they deem that the Bankruptcy Court had no jurisdiction to enter the clarifying order. It went beyond the court's jurisdiction.

Now, this went up on appeal. The Supreme Court granted cert on this case. It's interesting what the Supreme Court did, but I think it's also relevant here.

The first thing that the Supreme Court did was it recognized that the term policy claims was a broad term. It also recognized that there was some argument that these types of claims were -- well, let me just give you the specific language.

Okay. So, the Supreme Court said,

"The definition of policy claims contains nothing limiting it to derivative actions. And there is language in the 1986 orders directly to the contrary. The 1986 order is not only enjoined bringing expansively defined policy claims against the settling insurers, but they go onto provide that the injunction has no application to a claim previously brought against a settling insurer seeking any and all damages other then or in addition to policy proceeds for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims. There is no doubt about the implication that this same sort of claim brought after the 1986 orders become final will be barred."

So, basically, the Supreme Court said that there was a carve out in those orders saying that at the time that the settlement order was entered if there were certain types of these independent claims which were filed these were carved out, these were not enjoined by the injunction. They could go forward. But he said because that similar exception was not read into the broad policy claims definition for future claims it doesn't apply to any kind of future claims.

It also said -- of course, then it went onto the

res judicata which was that it felt that in MacArthur the second circuit had already ruled on jurisdiction. Now, there was no argument in MacArthur about whether or not a bankruptcy court had jurisdiction to enjoin non-derivative claims. It was simply derivative because it found that it was a derivative claim. But the Second Circuit did opine that there was jurisdiction.

So, the Supreme Court, the majority opinion ruled that because they already ruled on jurisdiction in MacArthur decades ago that that was final and there was no way that a party could collaterally attack that issue any further.

So, the holding of the Supreme Court doesn't dislodge at all the jurisdictional analysis that was performed in Manville III. In fact, it recognized that under the enactment of the channeling injunction in the bankruptcy code that, you know, you do have to demonstrate that claims are derivative in order to be subject to that injunction.

So, when it bounced back to the Second Circuit on remand the Second Circuit had to determine whether or not Chubb was barred, similarly, by this. And they found that they were not collaterally estopped from challenging whether or not the clarifying order was jurisdictionally void because of certain due process concerns. Chubb hadn't gotten notice of the settlement order being entered. They didn't have a proper counsel at the time.

So, with regard to Chubb the Second Circuit reaffirmed its jurisdictional analysis which is that a Bankruptcy Court simply does not have any jurisdiction to enjoin non-derivative claims which they defined, essentially, as any tort claims, claims alleging independent wrongdoing by insurance companies. And in my view the only kind of cases that are derivative claims in this context of asbestos litigation and bankrutpcy are the direct insurer actions.

So, I need you to help me understand why the claims that are being raised by these Montana plaintiffs under Johns-Manville would not be considered non-derivative claims. They are identical. These are tort claims alleging independent misconduct. I'm not saying that these claims are true, but they're alleging the same exact claims that were alleged in Manville III. I just don't.

I guess my final point is that I think that the channeling injunction provided an important protection for insurance companies. It said if you give us money from your policy proceeds and you settle-up then we're going to protect you, you're not going to get sued, but if you commit some independent tort you will be held liable for that. You can be held liable for that. The channeling injunction does not protect that. That is an independent claim. That is a non-derivative claim.

So, help me understand the distinction about the

claims at issue here and why my understanding of Johns-Manville wouldn't apply since you got the history.

MR. GIANNOTTO: Michael Giannotto, Your Honor.

Yeah, I congratulate you. I looked through those cases as did Mr. Cohn, and I'm amazed that, you know, you just read them and had them down pretty well.

Can I start out by saying one thing? The Third Circuit in our case here, Grace, has a footnote about the Manville case as saying the Montana plaintiffs have cited Manville, but that case was reversed by the Supreme Court. Anyway, you know, that -- to the extent that that -- that case was reversed by the Supreme Court and in that case the people conceded that the actions were not derivative. It said something like that in the footnote.

The Manville case, as your summary of the Manville is that only actions for policy proceeds are derivative. And the Third Circuit specifically said here, in our case, that is not the case. And as part of that general discussion of derivativeness when saying that suits for policy proceeds are not the only kind of derivative action that is where they cited the footnote in Manville as part of that discussion and said, well, the plaintiffs cite Manville, but there something was conceded and it was reversed by the Supreme Court anyway, and it was before 524(g) was even out there.

So, if you interpret Manville as saying only suits

for policy proceed are barred -- and I can understand how you can interpret it that way, but I am going to get to that. The Third Circuit has rejected that interpretation; plain and simple. That is our primary view, the Third Circuit has rejected that interpretation.

Now, in Manville you had a situation where it was pre-524(g). And the Third Circuit decided that in order for it to have jurisdiction something had to effect the estate, the --

THE COURT: Are you talking about the Second Circuit?

MR. GIANNOTTO: The Second Circuit. I'm sorry. It was pre-524(g). Here we have 524(g) which gives -- and you know, you cited some cases saying the Third Circuit cited Zale or something. You can't -- there's no power to have a cause of action against a non-debtor by a third-party, but 524(g) does just that. That is what it says. It enjoins certain claims by third-parties against non-debtors like insurers that qualify under 524(g).

So, the extent that Manville said that under that pre-524(g) framework you can't do that, 524(g) is an exception to that saying --

THE COURT: Well, 524(g) talks about derivative litigation. It's going to enjoin derivative claims, correct? It's not going to enjoin non-derivative litigation.

MR. GIANNOTTO: That's correct.

THE COURT: Okay. And so what the Second Circuit did say was, they said this is derivative litigation and this is non-derivative litigation. So, even though 524(g) was not yet in place it was, in fact, based upon all this litigation. And it clearly set forth what's derivative litigation in this context which is direct action litigation against the insurers. That is derivative litigation. They weren't saying, you know, in the entire world like the Third Circuit was saying in its opinion.

It is saying in the context of a bankruptcy asbestos case -- you know, I'm not saying that there might not be other types of derivative litigation, but they clearly gave -- that is an example. The direct action insurance litigation as derivative litigation and they gave the independent tort claims that third-parties have against insurers as non-derivative litigation.

MR. GIANNOTTO: But not claims like this. I agree with you. MacArthur, Davis, they held that if you --

THE COURT: Derivative.

MR. GIANNOTTO: They're suing for policy proceeds.

THE COURT: Yeah.

MR. GIANNOTTO: You know, you can do that.

THE COURT: Right.

MR. GIANNOTTO: Even pre-524(g). Okay.

THE COURT: Yeah.

MR. GIANNOTTO: Okay. And, again, I'm starting with the proposition that under your interpretation and maybe under the Second Circuit's interpretation only these direct actions for proceeds are barred. That is directly contrary to what the Third Circuit said in our case in Grace.

THE COURT: You mean because of the footnote?

MR. GIANNOTTO: No, because they said specifically in the text of the opinion --

THE COURT: They did say that.

MR. GIANNOTTO: -- that they want to limit it to policy proceeds, but we don't interpret this as limited to policy proceeds. Not in the footnote, but in the text.

Now, in Manville let's look at the types of things they said were non-derivative. Okay. You cited the West Virginia cases. That is not like this. The West Virginia cases were cases brought under statute saying when insurance companies had to adjust claims they adjusted them in a way that violated the statute. They didn't notify people on time. They didn't process their claims fairly. And the damages you get for that are like pain and suffering or because you didn't get your money on time because you, as an insurance company, didn't process the claim on time. They're not like the bad faith claims they have asserted against MCC.

THE COURT: Because there were bad faith claims in

the West Virginia case.

MR. GIANNOTTO: Right, but not the kind they're asserting. They were bad faith claims saying you didn't process our claims properly. And the damages for that aren't your damages for asbestos related disease. Your damages are from the delay, and hassle, and having to hire counsel because they didn't process them correctly. They have nothing to do with Manville's conduct. They have to do that once a claim was asserted and the insurance company is under a duty after the claim is asserted to process it fairly, and there is a statute that says you got to notify, you got to conduct an investigation within a certain period of time and all that. If they don't do that you can sue them and say, look, you know, you were supposed to pay us these proceeds under the policy and you didn't. You didn't adjust our claims properly.

That has nothing to do -- first of all, it has nothing to do with asbestos. The injury has to do with failure to process the claim. And it has nothing to do with the debtor. It is not like this case where they're saying we want recovery for asbestos related injuries caused by our exposure to asbestos admitted by Grace. And we're seeking to hold you liable because you didn't step-in and protect us or warn us about the dangers caused by Grace's admissions of asbestos.

In the bad faith cases they're saying we had a claim and you didn't process it properly after we made a claim, and we have now suffered damages because we have to hire a lawyer to sue you or whatever. It's a different kind of animal.

Another kind of case that Manville talked about were the cases where the insurer was being sued as a joint tortfeasor with other people, but if you read -- this is what I tried to mention before, probably in-artfully. If you go back to the Bankruptcy Court decision and you go back to the District Court decision, in that case they were suing Travelers not because they were exposed to Manville products, but because they were exposed to combustion engineering products. And they said Travelers, your combustion engineering is insured and you learned all this stuff from Manville, and you should have warned us. But the injury in that case was caused by the combustion engineering.

There was no claim that Travelers failed to protect them from Manville asbestos as the claim is here that we failed to protect them. So, that -- and, in fact, when we briefed this issue before Judge Carey and we briefed the issue before the Third Circuit because, as Mr. Cohn pointed out, the plaintiff's position before Judge Carey and before the Third Circuit was that only actions for policy proceeds were --

THE COURT: Derivative.

MR. GIANNOTTO: -- barred, were derivative.

That they, themselves, acknowledged, and we will find it in the briefs and send them to you. I don't have the briefs here. I didn't know Manville was going to be that big a piece. They acknowledged that that was the case, that these were claims against people for exposure to other people's asbestos, not Manville asbestos.

So, the Third Circuit was dealing with those kinds of cases. Okay. So, it wasn't dealing with our case right here. So, if you do limit it to policy proceeds I don't think you can because then you're directly contrary to the Third Circuit decision.

THE COURT: No, I'm just trying -

MR. GIANNOTTO: No, I understand.

THE COURT: To be perfectly honest I think the Third Circuit gave me directions which are inherently conflicting. It actually told me that I shouldn't consider Manville III at all, but to be perfectly honest I don't know how I cannot consider Manville III that the Second Circuit has specifically said -- the Supreme Court said that it was not touching the jurisdictional inquiry analysis in Manville III; it said it. It said it was a narrow holding.

Manville IV on remand, it said our jurisdictional analysis still stands and this is what we are holding.

Quigley even says, when it cites to Manville III, this is still good law. Judge Carey mentioned in a footnote Quigley, Manville III is still good law. So, you know, I'm not sure -- you know, at this point I think I have to acknowledge that Manville III is good law. The Second Circuit absolutely recognizes Manville III, the jurisdictional analysis as being good law.

MR. GIANNOTTO: Well, here we don't have a jurisdictional question.

THE COURT: We don't have a jurisdictional question.

MR. GIANNOTTO: The Third Circuit found that --

THE COURT: I call it jurisdictional inquiry because at the time they didn't have Section 524. I'm saying that they were using the derivative, non-derivative inquiry analysis as a way to help them determine whether or not they had jurisdiction in those cases. And I understand the jurisdiction is not an issue here, but I'm saying that they were using -- the Second Circuit uses the derivative, non-derivative analysis to help it determine whether or not it has jurisdiction in a case.

It's not a hurdle that must be satisfied because if there's another way to satisfy jurisdiction you don't even need to bring up the derivative, non-derivative analysis, but it says that it's a tool that helps us determine whether or

not we have jurisdiction. And it's helpful to me and I think the Third Circuit because the derivative, non-derivative analysis is exactly what we're dealing with in Section 524(g).

So, it is critical to me to understand what the Second Circuit considers to be derivative litigation and what they consider to be non-derivative litigation. And so far the only thing that the Second Circuit has said is derivative litigation are the direct actions against insurance companies. I'm not saying that there isn't something more than that, but they're basically saying claims against insurers based upon the insurers own misconduct.

Here, these are tort claims, negligence and duty to warn. These are the independent allegations of wrongdoing that they are laying at your feet. So, these appear to me to be non-derivative actions. And let's just be clear, in all these cases it comes down to what does it mean to say you have derivative liability. It means two things. You have to say derivative litigation is litigation that's looking to the conduct of the debtor, the insured. It's looking to the assets of the estate. When you have those two things, when you have litigation that's going to affect assets of the estate and litigation that is specifically relying upon the conduct of the debtor that is derivative litigation.

So, in direct action litigation you've got actions

against the policy proceeds, which is the race. So, that is the property. Then the conduct is they're not alleging that the insured did anything wrong, it's the actions of the debtor. In these independent tort actions these are separate actions. And I'm not saying that they are right and I'm not saying that they're going to win, but I'm saying that these are independent claims that they have laid at your feet, claims of negligence and duty to warn.

MR. GIANNOTTO: Yeah. And I guess I will respectfully disagree. That's the same argument they make to the Third Circuit and the Third Circuit rejected that argument.

THE COURT: Okay. But then how do you explain that the Third Circuit said I need to look at Quigley for the framework of derivative litigation. I look at Quigley and Quigley talks about the three Johns-Manville cases and the derivative, non-derivative analysis. That is what they talk about.

MR. GIANNOTTO: What they said is let's look at what Quigley said, let's look at the Quigley framework and under the Quigley framework a relevant inquiry is whether the duty that the plaintiffs are asserting now arise from a duty we would have to Grace, the debtor.

THE COURT: We need to talk about that.

MR. GIANNOTTO: All right.

THE COURT: Let's pull up Johns-Manville III at this point. The Second Circuit talked about the state duty because that is really what the Third Circuit told me to do. It said look at State law, right. And where did it get that? It got that from Manville III. All right. Hopefully, I'm looking at the right Manville. I think I'm looking at Manville IV.

Okay. On Page 67 of the Johns-Manville III case it was addressing the Bankruptcy Courts reliance on its factual findings. The Bankruptcy Court made a lot of findings like Judge Carey did which is that, you know, all the facts are related to what the debtor did wrong here with the asbestos.

So, what the Second Circuit said was -- just to back-up here, this is what the Second Circuit said.

"The District Court made particular note of the Bankruptcy Courts extensive factual findings regarding Manville's dominating presence in the asbestos industry and its thirty year involvement with Travelers. The Court embraced the Bankruptcy Courts factual findings that Travelers learned, virtually, everything it knew about the asbestos from its relationship with Manville and that the direct action claims against Travelers inescapably relate to its insurance relationship with

Manville."

The Second Circuit says about this,

"There is no doubt that these findings by the Bankruptcy Court document the factual origins of Travelers alleged malfeasance. The factual findings are, however, only part of the liability equation. What remained was a legal determination. Did Travelers owe a duty to the direct action plaintiffs independent of its contractual obligations to indemnify those injured by the tortious conduct of Manville."

This is the State Law test. This is the test that you guys need to satisfy. And here the question was, and I'll just repeat it, did Travelers owe a duty to the direct action plaintiffs independent of its contractual obligation to indemnify those injured by the tortious conduct of Manville. And I will translate it to our case, did CNA owe a duty to the Montana plaintiffs independent of its contractual obligations to indemnify those injured by the tortious conduct of Grace. Here, they have a duty, there's a duty under State Law.

MR. GIANNOTTO: Well, we don't know if there's a duty under State Law.

THE COURT: I don't know. Right.

MR. GIANNOTTO: I guess I --

THE COURT: That's the language.

MR. GIANNOTTO: -- can only say what I can say. They argued that, the Third Circuit. The Third Circuit opinion --

THE COURT: The Third Circuit has a footnote and the footnote talks about a duty, and I can't find that reference anywhere in Manville III. And the footnote is in Footnote 7. This is how they characterize the framework,

"Our framework comports with that developed by the Second Circuit in Quigley where in it looked to the relevant State Law to determine whether the plaintiffs rights derive from the debtor's rights and the alleged duty the third-party owed to the plaintiffs derived from the duty it owed to the debtor."

It cites Pages 54 to 58, but I'm reading you right now the specific quote from Johns-Manville III about what the specific State Law inquiry is and that is it. And tell me, so spend your alliance upon the Third Circuit for a moment, sir, and tell me how you would answer this question. Did CNA owe a duty to the Montana plaintiffs independent of its contractual obligations to indemnify those injured by the tortious conduct of Grace? Answer that question for me.

MR. GIANNOTTO: I don't know.

THE COURT: I'm going to give you a lunch break.

So, don't worry about it. We'll come back.

MR. GIANNOTTO: Okay.

THE COURT: I want you to --

MR. GIANNOTTO: I can say this. All right. We will forget about the Third Circuit if it doesn't exist, but I mean that's why we're here because there's a Third Circuit opinion. I can read to you the language of the Third Circuit opinion that says, you know -- what you're basically or what you are --

THE COURT: My interpretation.

MR. GIANNOTTO: Your interpretation is that the Third Circuit opinion means that the only actions against us that are enjoined are actions for policy proceeds. The Third Circuit noted a footnote. That is not the case. And in the case of the cases they cite like Dodds and Gas, they're using cases where the defendant is going to have to pay money out of his own pocket, not where he's indemnifying the other person that he is supposedly derivative of. So, the paying out of the pocket.

I mean you had said before you interpret derivative as meaning there was something like --

THE COURT: The conduct.

MR. GIANNOTTO: It's taking money from the rest of the estate. I don't think the second part is correct.

THE COURT: Okay. I just want you, on our

lunchbreak -- I'm going to have you focus on these. First, you are going to answer me that question right there about the State Law duty. You're going to answer me that question. Second, I want you to look at the Johns-Manville III case when it distinguishes MacArthur and Davis from this case here. It's on Page 63, okay.

> "The claims at issue in MacArthur and Davis differ significantly from the statutory and common law claims at issue here. Travelers candidly admits that both the statutory and common law claims seek damages from Travelers that are unrelated to the policy proceeds, quite unlike the claims in MacArthur and Davis where plaintiffs sought indemnification or compensation for the tortious wrongs of Manville to be paid out of the proceeds of Manville's insurance policies. Instead, the plaintiffs seek to recovery directly from Travelers, a non-debtor insurer, for its own alleged misconduct. Plaintiffs neither seek to recovery insurance proceeds nor rely on the insurance policies for recovery."

This is why I say when you look at derivative liability that is what derivative liability means. And here let's say the Montana plaintiffs go, they proceed with their litigation and they win against your client. Do they get a

claim against the insurance policy proceeds? They absolutely do not get a claim against the insurance policy proceeds. They get a claim against CNA. They will get a judgment against CNA and they will come against CNA for its own personal assets. They will not come against the policy proceeds. You cannot possibly dispute that.

MR. GIANNOTTO: I don't dispute that.

THE COURT: Okay. So, that's part of the problem and then the other problem is whose conduct are you coming after? And you have to answer that legal question for me when we get back from lunch. Then I want to hear about that.

MR. GIANNOTTO: Okay.

THE COURT: So, you have to understand the dilemna I face, okay. The Third Circuit has given me instructions on remand and my personal opinion, it conflicts. You can't tell me that I can't look at Manville III, but I must look at Quigley in order to understand the framework of derivative, non-derivative analysis.

So, what I'm going to do is I'm going to look the Third Circuit's opinion and I'm going to try and read it in a way that makes sense. And the way that I'm inclined to read that opinion now is to hold that the Third Circuit outlined, outside of the context of asbestos cases and bankruptcy, what it means to have derivative litigation and non-derivative litigation, and it gave me some examples.

Then, with regard to my specific instructions here, I am to look at state law, based upon the framework established in Quigley and Quigley establishes that framework based upon Manville III. So, when I look at that, I'm going to say, Okay, well, the Third Circuit said that, you know, derivative liability means all of these other things outside of the context, but for my specific task, I should look at Quigley.

And when I look at Quigley and I determine where the state law requirement came from, I have to answer that question. And when I answer that question, I can find no other answer than to say that they are bringing independent tortious claims against your client, which are simply non-derivative claims.

And the only basis -- like you can't -- like, is there any impact that this litigation would have on the estate? Is there any impact that it would have?

MR. GIANNOTTO: Yes.

THE COURT: Okay. And you're going to tell me it's that settlement agreement provision that you guys entered into; is that what you're going to tell me?

MR. GIANNOTTO: Correct.

THE COURT: Okay. Now, I'll tell you why that doesn't make sense. To me, in order for you to have jurisdiction over a case, you have to have this potential

impact on the estate. What it means is that there has to be some direct result.

Here, if the Montana plaintiffs win, they will have a judgment against CNA. The direct result of their litigation will be a judgment that they will enforce against CMA against its own assets, and that, that First Step, will not impact the estate at all. And if you're going to try to argue in front of me, that, Well, but Judge, the $13 million, it's going to have to come out of the trust, I'll tell you this, I'll tell you that you cannot possibly consent to jurisdiction.

And I know under the Third Circuit, it talked about it and I cannot make any ruling on jurisdiction, but it doesn't make any sense to me that parties in a bankruptcy could make an agreement to give you jurisdiction. Because you know what you would do from here on out in every single settlement agreement that you enter into with a debtor who has asbestos litigation facing them? You would say, Okay, debtor, if I, the insurance company, is sued outside of the Bankruptcy Court, and they win some kind of judgment against me, then you must reimburse me a dollar for whatever that amount is, and that gives me jurisdiction. That's what you would do in every single case and then you would guarantee that that type of litigation would be, you know, you could try and argue it has some impact on the estate.

And that can't possibly be correct. That would just be a perversion of what jurisdiction means. Jurisdiction is talking about indemnification claims that you get before entering into bankruptcy; the debtors, you know, indemnifying its officers. You can't get indemnification -- you can't get -- the impact on the estate can't just be because you agree to it in my opinion.

MR. GIANNOTTO: And, Your Honor, when we were before the Third Circuit and the jurisdictional question was raised -- and I apologize for not being as familiar with the issue as I should be -- you know, we would argue the jurisdictional question. And the jurisdictional basis here is more than the fact that the trust will have to indemnify us up to a certain amount.

You know, in this case, we're basically suing to enforce our rights under statute, and so this case arises under the Bankruptcy Code. And we had cases that we cited to the Third Circuit -- I don't remember what they were -- but in this case, we have certain rights granted by 524(g), and we're suing to enforce those rights and this Court has jurisdiction. You know, 524(g) is not a jurisdictional statute; it's a statute that gives you power to order relief --

THE COURT: If your claims are derivative.

MR. GIANNOTTO: I understand, but that's just --

again, we have to decide whether they're derivative, but it's not a matter of, you know, independently now saying, Does it affect the bankruptcy, whereas, does it not affect the bankruptcy?

Unless you want to say that the derivative requires that, which, in my view, the Third Circuit says is not the case in our particular case. So we're turning around in circles.

But, the fact is, it's not just the $13 million. If our cases covered -- and I'll step aside, you know, the Supreme Court ultimately held the Travelers v Bailey -- and, again, I haven't read it in years -- but my memory is that they held that the injunction there didn't cover these claims.

THE COURT: It covered future claims. And so -- and so if you had those claims, that carve-out covered it.

So, it said in the future claims, it's not going to cover it, and I think that what Judge Steve's said in dissent, which I personally found a little bit more persuasive, but, you know, the Supreme Court said what it said, you know, what he said was that, Yeah, some of these -- number one, he said that derivative claims weren't even mentioned. So, it wasn't even mentioned. If it had been mentioned, then it wouldn't be there, right?

I mean, the order didn't talk about it. The

policy-claim definition wasn't limited to just derivative litigation. It was a broad, very broad definition.

MR. GIANNOTTO: Right. But the Supreme Court ultimately held that the injunction was broad enough to cover it and you couldn't challenge jurisdiction anymore. And Judge Lifland, the Bankruptcy Court judge, himself, had entered into that weird settlement with Mario Cuomo and the whole thing --

THE COURT: Yeah. Yeah.

MR. GIANNOTTO: -- you know, said the injunction always covered this.

And 524(g), by the way, was based on Lifland's injunction. So, you know --

THE COURT: But the Second Circuit has held, with regard to Chubb -- because it did have jurisdiction to look at that -- with regard to Chubb, it absolutely could not enjoin that third-party litigation.

MR. GIANNOTTO: Right. Again, because the third -- but the Third Circuit has a different view.

But, again, I think that --

THE COURT: I need to reconcile the Third Circuit's instructions to me, right?

MR. GIANNOTTO: I'm trying to help you, because I know that you have certain views you've formed there the opinion and I have other views I formed from the opinion.

THE COURT: And, you know, when I read the opinion, I was really -- you know, I tried to understand the best I could, but, you know, really, they didn't really get into -- I mean the opinion is quite short, right, I mean, just a page or two on all of this.

And you know, in order to fully understand what it means to be derivative litigation, you have to look at the Johns-Manville cases, you just have to.

MR. GIANNOTTO: And, again, that is what was briefed before the Third Circuit -- the Manville case, the Quigley case -- and, you know, the Plaintiffs' position, the Montana Plaintiffs' position was that under those cases, only the policy proceeds are protected.

THE COURT: I understand.

MR. GIANNOTTO: And the Third Circuit specifically said, That's not the case.

THE COURT: Right. And I'm not taking a position, I'm just telling you what my interpretation of a Second Circuit case is.

MR. GIANNOTTO: Right. And, also, we'll come back after lunch. I hope you you're going to grill him as hard as you're grilling me --

(Laughter)

MR. GIANNOTTO: -- but we'll come back after lunch -- only kidding -- but, again, the claims in Manville were

different from the claims here. The claims in Manville, you know, under the West Virginia statutes were claims for failure to process a claim properly, and so it's a different kind of damage.

THE COURT: Okay. Let's do this, let me raise one other thing.

MR. GIANNOTTO: Sure.

THE COURT: So, you're going to answer the state law question, and to me, that's really the problem with the Third Circuit case, because it references, you know, my need to look at state law, and where that comes from is Johns-Manville III. If you scan find me a way to distinguish that, and that that's not -- that that law -- that that test is not the test that I should be applying, I'm certainly interested in hearing that, but I think that's where the Third Circuit got its test from. It came from Manville III. You may not have realized it, because it was talked about in Quigley, but that's where that test came from.

Okay. So, the only other thing, besides that, that I would like you to -- so, you'll answer that legal question. You'll talk to me about my interpretation of what derivative litigation is, which is that little passage that I read for you from Manville III about the distinction, you know, on McArthur and Davis on the one hand and then the claims in Manville III on the other hand and they were talking about

how, you know, the distinction about the conduct and the property of the estate. You know, I need you to tell me why that's not the derivative analysis test that I should be performing.

The last one comes from Quigley. You know, there's -- the Johns-Manville case had all this discussion about derivative litigation, but there's not a lot of talk about the statutory relationship, and, you know, it's confusing, you know, because when I first read it, I'm admit that I was totally on your side. I mean, this is -- and I'm not saying that I'm not -- but it just seems to me that on the statutory relationship, it seems like you have the better argument, but for the insurance contract, we wouldn't be here.

We are talking about duties that specifically arise from the fact that you had this insurance contract. But when I looked closely at Quigley, when it talks about the statutory relationship, there was something there that the judge said that bothered me. When it talks about the statutory relationship, it talks about the four types -- the reasons why those four examples are given as the statutory relationship and they're all talking about how there's litigation liability that could arise out of each of them.

And when they talk about the insurance piece, they, again, talked specifically about direct actions against insurers. So, other than this one cite, there's just not a

lot of discussion about, you know, what exactly it means. But I want you to focus on the relationship, because that's, I think, the key: Is the relationship critical to -- that insurance relationship, is that critical to me finding the statutory relationship?

Okay. So, in terms of questions for you, you know, I don't have many questions for you. I read your brief. There were certain things you said in there that were just not applicable. I think that with regard to whether the restatement -- you guys can all sit -- when you talk about the restatement, I'm really not inclined to grant the motion to certify this question. I really think that this is, where we're talking about the same type of issue.

You know, in the Johns-Manville cases, there was never such a fulsome discussion of state law in that case, as there is here today. And I think it's not necessary because, although each of you argue that under your -- under both of your statutes -- under both of your readings of what Montana would require for negligence and duty to warn, that you would both win.

I think that at the end of the day, both of yours tests are quite similar, which is that if you perform a service and it's foreseeable that a third party might be harmed by your provision of that service, that there is some duties. That's generally how I see both of the types of

claims that you raised, and under each of those, those are independent tort claims, as I view these.

So, I really don't think that there's any need here, and I think you only invited the Bankruptcy Court to look at whether it was necessary to certify these questions, because you thought that if I needed some clarification -- and I don't -- I think that these are tort claims. They're alleging tort claims. I don't know if you're going win at the end of the day, but they appear to be independent tort claims to me.

So, let's take a break now. It's 12:30. I'm inclined to come back at either 1:30 or 2:00, and you're welcome to take until 2:00 so that you can both eat and try to answer all of my questions. So, what would you like us to do, meet back at 1:30 or 2:00?

MR. GIANNOTTO: Either/or -- whichever is more convenient for you, Judge, is okay.

THE COURT: Okay. 1:30. Let's say 1:30. Okay. All right. Thank you, all.

You can leave everything in the courtroom. She's going to lock everything up. So, as long as you trust everyone currently in the room now, she's going to lock the door, so you can keep whatever papers you want in here, okay?

MR. COHEN: May I have just 10 seconds, Your Honor?

THE COURT: Yeah.

(Pause.)

MR. COHEN: Your Honor, we are both --

THE COURT: Give us another case.

(Laughter)

MR. COHEN: Both, Counsel and I, unfortunately, are not in possession of hard copies of Manville III. Is there any way that we could prevail upon you to --

THE COURT: I can give you -- yeah, okay. I won't give you my color copies, but I can print out Manville 3 and anything else that you'd like during the break.

MR. GIANNOTTO: Manville III and Quigley, I guess.

THE COURT: Manville and Quigley?

MR. COHEN: We have Quigley.

MR. GIANNOTTO: Oh, we have Quigley?

MR. COHEN: Yeah.

THE COURT: Okay. All right. We will do that now, so everybody just sit tight.

Kristen, do you have all the cites or I can give them to you now.

MR. COHEN: Thank you, Your Honor.

THE COURT: Sure, of course. This is Manville III and this is Quigley.

THE CLERK: Okay.

THE COURT: Now, what I would do is, so that they don't see all of my handwritten notes --

THE CLERK: I can just do --

THE COURT: How many copies should I -- easy to have an adversary proceeding, and whatever my opinion is in this case, you know, we'll just see what the Third Circuit says about that, and whatever comes back to me, then I'll handle those matters.

Does that sound good?

MR. GIANNOTTO: So, you think we'll go up?

THE COURT: Excuse me?

MR. GIANNOTTO: You think we'll go up?

THE COURT: I can't imagine that I'll be so -- and I will try, in my opinion, to try to persuade both of you about my reasoning, but I anticipate that there will be vigorous appeals of my decision. How could I possibly satisfy both of you?

Okay. Well, thank you all, and she'll be out in just a moment with that.

Anything else?

(No verbal response)

THE COURT: Okay. Thank you.

MR. COHEN: Thank you, Your Honor.

MR. GIANNOTTO: Thank you, Your Honor.

(Recess taken at 12:30 p.m.)

(Proceedings resumed at 1:35 p.m.)

THE COURT: All right. But anyways, it's not

personal. This is just a pure, legal argument, which I think you can all tell that I find is fascinating, absolutely fascinating. Okay.

MR. GIANNOTTO: Okay. Michael Giannotto, again, for CNA. Two preliminary things before I answer your questions forthrightly -- as forthrightly, as I can.

One is, you know, these issues sort of came up today. To the extent that you think it would be helpful for the parties to submit, you know, five-page briefs or something addressing them, because we sort of addressed them on the fly here, we'd welcome that.

THE COURT: You know, I spent a lot of time looking at all of the Manville cases, the McArthur case, Manville III, Manville IV, the Supreme Court case, you know, the Davis case, so I feel pretty comfortable with them. I'm not sure if you feel the need to point something out in those cases that I've missed, but I'm certainly open to that if you ask me to do that.

MR. GIANNOTTO: Well, let's wait until the end of the argument --

THE COURT: Okay. And see how it goes?

MR. GIANNOTTO: -- after you hear me point the holes in it.

THE COURT: Okay.

(Laughter)

MR. GIANNOTTO: The second is just to make clear throughout the argument, when you talk about, you know, was there a legal duty independent of proceeds, you know, what we're talking about is that the plaintiffs allege there is a legal duty where --

THE COURT: I completely agree.

MR. GIANNOTTO: The (indiscernible) Court hasn't decided whether there's any legal duty here under state law and --

THE COURT: I completely agree. I mean, they could be losers. I mean, they could be totally losers --

MR. GIANNOTTO: Right.

THE COURT: -- and, in fact, in Manville IV, the Second Circuit ended it with a really curious -- or maybe it was at the end of Manville III -- but it said, Look, we think that what the Bankruptcy Court was trying to do all along was, it knew that the state law claims were going nowhere, so instead of, you know, prolonging the torture, it just ended it. It saw that there was no basis for the state law claims, so it reached a little bit farther than it ought to try and get to the end of the day, which is what the Second Circuit thought was going to happen, which is that they weren't going to win anything.

So, I'd make no opinion -- I have no opinion whatsoever as to whether or not there's merit or whether they

have claims at all. I'm just trying to understand the mandate that's been --

MR. GIANNOTTO: Right. And the third thing, all of my remarks on what Manville allowed and didn't allow, I should have prefaced with what I said about 100 times this morning, but I'll say it again, that we think the Third Circuit decided that -- to limit these claims to policy proceeds claims --

THE COURT: I completely agree. In my opinion, I'm not going make any kind of statements saying that -- I mean, I can tell you what I think based upon my interpretation or reading of it, but I clearly understand that derivative litigation is not limited strictly to claims against insurers, those direct-action claims. I completely agree that that's not something that I'm going to touch. That's what the Third Circuit said, so it goes beyond that. There are some other types of claims that would constitute derivative claims; in addition to that, I don't know what they may be, but that's what they said.

MR. GIANNOTTO: So, to get to your actual questions --

THE COURT: Yes.

MR. GIANNOTTO: -- final, with the drumroll -- you asked whether -- focusing on a statement in Quigley that was discussing Manville, whether he or the plaintiffs are seeking

compensation for the tortious wrongs of Grace to be paid out of proceeds of Grace's insurance policies, whether, in this case, that's what they're seeking. And the answer so that is no, they're not seeking that.

They're seeking compensation from CNA's and MCC's own assets, allegedly based on tortious wrongs that CNA and MCC committed, okay. That's -- so, the answer is, no, they're not seeking proceeds to the policies.

As a follow-up question, you had said something like, well, how would this benefit the estate? And we talked a little bit about the indemnity, and we expressed our views on that, but, you know, this will affect the estate, regardless of whether they're seeking the proceeds of the insurance policies, in several ways. They're not as direct as if they were paying the policy proceeds.

One way is that it's going to deter future settlements. One of the reasons -- and the Third Circuit points this out both, here and in other opinions they've issued in bankruptcies -- that a lot of these asbestos bankruptcies, the sole, or at least a primary set that the debtor has to fund these trusts is insurance proceeds -- and it's true, you could say, Well, the insurance company is only settling its liabilities under the policies and that, you know, whatever.

But the fact is, that's not how insurance companies

work, and insurance companies, when they settle, they want finality, and that's what 524(g) gives them or they think it gives them, that they're going to be rid of all claims that are based on the debtors' conduct, and that's going to be the end of it.

And I think to the extent that there's a ruling here that these types of claims that they're trying to assert are not covered by the injunction, it's going to deter people from settling in the future. And I'm sure Mr. Cohn is going to say, No, it's not, but I'm just telling you from my experience with insurance companies, they want finality; they don't want, Well, we'll pay a fortune now and then we'll litigate something a little later on.

The other way to potentially affect the trust is that if we were held liable in Montana for causing their injuries, we would, absent the bankruptcy, we would have a contribution claim or maybe even a common law indemnity claim against Grace, because we would argue that they're the primary wrongdoer. So, we would be asserting that against the trust, you know, as what's called an indirect PI trust claim; it's a claim for contribution or common law indemnity.

You know, in addition to the contractual indemnity, we have -- there's 4.5 million left out of an original thirty-million statutory indemnity. So, even though this is not going to be paid out of policy proceeds, if there is a

duty and if we are held liable, it will impact the estate both, now, and it will impact future estates.

And I think that's one of the reasons that Congress passed 524(g), was that, you know, we cite all these things and the Third Circuit does. For the Third Circuit, Congress wanted to encourage these kinds of settlements and make money available for plaintiffs, you know, so they wouldn't have to go through the tort system; they could just get the money from the trust.

Are the Manville facts different from our facts? Absolutely. And I think this is important. You know, Manville, if you want to read just the bear holding, yes, I think Manville III holds that only suits for policy proceeds are protected under pre-524(g) law.

But the facts in the Manville case, you know, it so forth brings up is this idea that Mr. Cohen brought up. Sometimes courts, you know, will give broad pronouncements but they're not thinking of all the situations. And in Manville, I was surprised when I read the decision just now that I was correct when I said to you this morning, that they pointed out two examples in that case. One was people were suing under West Virginia law for bad faith damages, for annoyance, and convenience. They weren't suing for asbestos-related injuries. They were suing because the insurance company breached its duties that it had under state law,

independent duties under state law to settle claims, to process claims fully. And their damages were not their asbestos-related injury. They were that, and that's not this.

Secondly, they pointed to the Zale case, which based on my reading of the Manville opinion, again, involved getting rid of bad faith claims against the insurance company --

THE COURT: Which is a claim that is pending against your colleague -- you know, MCC right? They have a bad faith claim pending against them, and I'm not saying -- I know that -- I saw the summary judgment -- I think it didn't work on the current one, but they are alleging bad faith against MCC.

MR. GIANNOTTO: Yeah, that's a different kind of bad faith claim. What the Manville case was talking about was a bad faith claims that arises because there has been a claim. You have to investigate and pay the claim and you don't.

Their claim against MCC -- and Mr. Longosz can speak more about it -- is more -- it's a weird claim. It never arose before, that's why the Montana Court -- the lower court threw it out.

But it's basically saying, because you knew of the dangers and didn't warn in guy, that's bad faith. That's

just sort of saying the same thing, almost, that they're saying on their duty to warn theory, only they're encompassing it within bad faith.

But what a traditional bad faith claim is, and what the bad faith claims the Second Circuit was talking about, were not claims seeking recompense for asbestos-related injuries, like, you know, I got sick, I can't breathe, pay me whatever it costs for my doctors and employment.

It's a bad faith claim where someone doesn't process the claim right and you get all upset because you're not getting the money and maybe you can't pay your mortgage and you lose your house and you have to hire an attorney. That is not derivative, okay? And that's what they were -- that's the fact of that case. I agree the wording is broader, but that's the facts of that case.

That's not the facts of this case. The facts of this case, and the facts of the bad faith claim against MCC is they are suing for recompense and tort for the asbestos-related injuries that they incurred or allegedly incurred, due to their exposure to asbestos released by Grace.

THE COURT: Okay. Stop right there, because you know that the Third Circuit has already addressed that issue in its opinion. It can't -- you can't simply tell me -- I mean, this is the argument that you made to them, right, which is they said was too broad. Let's just look at that

case briefly.

Okay. Likewise, CNA's proposed interpretation is equally unpersuasive that a debtors' product can you describe a plaintiff's injury is not enough to render a third party liable for the conduct of, claims against, or demands of the debtor.

And so, they did not like the interpretation in the Pittsburgh Corning case, such a rule, however, has the potential to include third-party liability.

So, you can't just tell me, you have to give me something more.

MR. GIANNOTTO: No, I was going to give you something more.

THE COURT: Okay. I'm sorry.

MR. GIANNOTTO: I was going to give you more.

THE COURT: All right.

MR. GIANNOTTO: The predicate is that they're alleging injury due to exposure from asbestos released by Grace, and their claim against us is, you learned of that danger and you engaged in industrial hygiene services and you didn't protect us from that danger which caused our injuries. You didn't protect us. You didn't warn us. And so, it's not like the bad faith claim where you're just all on your own and you committed tort, caused them new damages and all that.

Here, the basis of their claim, under any of their

theories, under their professional-negligence theory, which has no base in Montana law, in my view, but that theory, the duty to warn theory, the 324(a) theory, under all of those theories, they're premised on the fact that these people were injured because of Grace's asbestos emissions, and we didn't do anything to protect them. And so, our liability, under any of those theories, is dependent upon Grace's wrongful conduct.

THE COURT: Although, it's not an element under state law, right? I mean, under state law, it's a duty, there's a breach of a duty, so on and so forth. So, it's the duty part, and the duty, the breach of duty, it doesn't have to do with anything. I mean, no one is going to say anything about Grace for that duty.

MR. GIANNOTTO: I disagree with you, Your Honor.

THE COURT: Tell me.

MR. GIANNOTTO: I will. I think the hot court, when it decides these issues, will issue clarification, but there's a difference under Montana law, and the law in almost every jurisdiction, between them needing to taking action to protect someone from an existing danger, and creating a danger yourself.

THE COURT: Like a formative action.

MR. GIANNOTTO: So, they cite all these cases, you know, where either the actor created the danger by his

conduct or was under some statute duty to warn or something, which we don't have here, okay.

But in the case of failure to warn, the restatement, which is generally accepted by the Montana courts; admittedly, they haven't adopted this provision, although -- 324 -- unless Mr. Longosz pointed out, the Federal District Court has predicted it would be Montana law.

There are limited circumstances in which someone who fails to take action to protect someone or warn them of a danger can be held liable. And those are laid out. You know, you could have a statutory duty to do it. You could have custody of someone, like, if you're a jail guard and you have a prisoner or something, and if you're a property-owner, you have special duties of property-owners that go back all the way to the time of the (indiscernible), and they've got to protect people.

But the only one that applies here, we argue, is the restatement, 324(a), and that's a specific provision that deals with whether when you undertake actions to protect someone from a danger that exists, you could be liable under certain circumstances. In order for that provision to apply, you have to be taking action to protect someone from a danger, and that met the cause of action. The element of the cause of action is you have to protect someone from a danger, and here, that danger was caused by Grace.

Is it true -- by "element," what they mean is, do we have to prove, as part of our cause of action, that Grace is also liable, like you would have to do under sponde and superior, like, they're liable and we're now the parent or something? No.

But we have to show, as part of -- or they have to show, if 324(a) is the cause of action, that there was a danger and we undertook to protect them from it. And here, the basis of their complaint is that we undertook, as Grace's -- they don't want to call it as their insurer; they say it's separate, but whatever -- as the people that were in that plant, we undertook to protect them from this danger, and that's no longer the cause of action.

Here, the danger was created by Grace's wrongdoing. The conk-on-the-head example, that doesn't exist. You know, we're not doing anything to protect them. If we had gone in there, as Mr. Burgess said, and somehow rammed into a bag of asbestos and it fell on someone's head, okay, we created the danger. It has nothing to do with Grace's wrongful conduct. We just rammed into a bag of asbestos.

But here, the whole cause of action, whether it's based on failure to warn, professional services, 324(a), the whole thing is, there's a danger out there and you start to address it and you learned about it and you didn't do right by these Plaintiffs, and that means that the element of any

of these causes of action is that there is a danger out there that we're undertaking to protect them from and, here, that danger was created by Grace's wrongful conduct.

And that's different froth bad faith cases that Manville is talking about. There, the danger or the risk was created by the insurance company by its sloppy claims-handling issues.

THE COURT: Claims handling, I understand.

MR. GIANNOTTO: It wasn't like this. So, what I'm saying is, yes, the Manville case, on its face says, is it proceeds or not proceeds? And if that's the case, you know, if Manville governs here, we lose because we don't think it does, because they're not seeking the policy proceeds. That's absolutely clear, and one of the things that Mr. Cohn and I can agree on (indiscernible).

But if you look at the facts of Manville, they're different from the facts here. And let's also look at the facts of Quigley, because I think this is important. You know, in Quigley, as you know, it was this apparent manufacturer thing and whether it was by reason of being the parent or whatever, and, you know, they never really argued in detail what "legally relevant" meant, because the Pfizer basically said we don't think that's the right test.

But look at things here. Here, what they allege is that we had a duty to warn or we had a duty to protect them

or whatever, but every one of those duties that they allege that we had, derives directly from their allegation that we undertook these industrial hygiene services, okay, and argues that those industrial hygiene services are insurance.

So, if you accept our view that the industrial hygiene services are insurance, then their cause of action arises by reason of the provisions of insurance, because the legal duty we have is based on providing those industrial hygiene services or learning the dangers and not warning them; it derives from that.

Quigley is different. In Quigley, Pfizer put its name or logo or something on the product. Its duty to the people it sold it to didn't derive from services that it was providing for the benefit of subsidiary or to the subsidiary. It was not acting as a parent when it sold those products. It was acting as a vendor of products trying to make a buck.

Here, we were always acting as an insurer, and, you know, the Third Circuit has a footnote that says, if your duty derives from the provision of -- you know, it's another one of those.

THE COURT: Can you show me where it says that in the underlying case, and I'll see it, but I could not find that. I mean, I know where the Third Circuit's footnote is --

MR. GIANNOTTO: Okay.

THE COURT: -- and they have that duty statement, but when I go back to the case where I got it from, I could not find where -- I just come up with a legal test that I made your answer before, which is what was outlined in Manville III and Quigley.

MR. GIANNOTTO: But, again, you know, in this case, we always act -- if you agree with us that industrial-hygiene services are insurance, are a part of insurance -- and I know they disagree with that, okay -- but if you agree with that provision, that under any of their theories of our theories, any duty that we would have had to these plaintiffs arose from the provision of insurance because they all arose from what we learned or what we did when we --

THE COURT: So, you're arguing statutory relationship?

MR. GIANNOTTO: Right. That -- I just wanted to get to that on Quigley.

THE COURT: Right. So, answer me this, you know, when I read those Montana cases, it seemed like what the kind of model was developing was that, you know, if you had, you know, the accountant -- like I said before, if you had an accountant perform a service for Party A, right, and as part of providing those services, it was foreseeable that someone was going to rely upon that accounting report that they prepared, and they person ends up being damaged, that they

have a duty of care to that third party, even though there's no privity of contract between the injured party and the accountant.

And so, here, help me understand why that analogy doesn't not apply. Here, I think that it looks to me like CNA provided these inspection, hygiene services to Grace, so they provided these services to Grace. It was foreseeable that employees could get injured if they didn't perform these properly. So, if they were negligent in performing that service, doesn't that mean that they could then have a claim of negligence against CNA?

MR. GIANNOTTO: All right. There's two things -- there's two points to this. One is, in the case of the accountant and the people buying the pipe and the people buying the steel, it was the entity being sued that created the danger. The accountant made a crummy evaluation of a company and then people relied on it, to its detriment.

Here, as I was trying to explain, Grace created the danger --

THE COURT: Well, okay, but look at what they're arguing. They're saying, obviously, we all know that Grace created a danger -- the asbestos was bad. But I think that what they are alleging is that in addition to Grace creating this asbestos danger, you guys were supposed to come in and perform a service, and you did not perform that service

properly.

If you -- in an ideal world, if we could have rolled the clock back for decades, right, and CNA had the opportunity to perform hygiene-inspection services, they would have said, Listen, everyone, take showers, wear this, you know, signage all over the place. In order for us, CNA, to perform our duties properly under the contract, this is what we would have done, and if they would have done, that then the only -- then I would agree that, you know, they didn't do anything wrong under the contract. It just would have been Grace's asbestos.

Do you see what I mean?

MR. GIANNOTTO: Well, I think --

THE COURT: That's why I think that they're (indiscernible).

MR. GIANNOTTO: Right. But what you're confusing is, can they state a cause of action against us for an independent tort with whether -- assuming they can, and that can be argued in the Montana courts --

THE COURT: Yeah.

MR. GIANNOTTO: -- whether that tort is derivative within the meaning of 524(g).

THE COURT: Yes.

MR. GIANNOTTO: The fact that they can assert a cause of action, I mean, the only reason we need 524(g) is

because they might be able to assert a cause of action against us.

And we're arguing in Montana they're going to try to assert a claim and they may be successful in asserting a legitimate claim against us for negligence, okay. We're not disputing that. I mean, we're assuming that's true.

But for purposes here, the question isn't whether they can allege some tort against us that holds us liable outside of --

THE COURT: Right. You think it's derivative.

MR. GIANNOTTO: -- (indiscernible), the issue is whether what they're seeking to hold us liable for is derivative of Grace's wrongdoing within the meaning of this Third Circuit opinion.

And my argument is that it is, because the theory -- any of the theories discussed today on which they would seek to hold us liable, is for failure to protect or warn their clients of dangers created by Grace. So, they're derivative of Grace conduct not just because the people were injured by Grace asbestos -- the Third Circuit said that's necessary, but not sufficient -- but it's not just that they were injured by substance exposure to Grace asbestos, but because we're being sued for failing to protect them from a danger created by Grace's wrongful conduct. That's the basis of the claim. That's what they would have to show under any

of their theories of 324(a) as an element of the claim. Not that Grace, itself, is liable, but that there is a danger out there and we failed to protect them from that.

So, I don't think the issue is whether they can assert an independent tort or -- I don't know if it's independent -- whether they can assert a tort against us and recover from us, even if they couldn't assert a tort against Grace or (indiscernible). I think if they can assert a cause of action, that's fine.

The issue is whether whatever that cause of action is they can assert against us, whether that's derivative of Grace's wrongdoing, and I think it is for the reasons that we've given in our briefs.

THE COURT: You know, when we talk about the injunction under the Bankruptcy Code, you know, we talk about wanting to incent insurance companies to provide money for the trust so that they can be paid out in an orderly fashion. But when I read -- you know, when I read the strict language of these Johns-Manville cases, it made me think that while certainly claims against the insurance policies should be enjoined, because that's what you're giving the money up for, does that give the insurance companies a license to do whatever they want when they perform that contract, that while they should be protected from properly performing under the insurance policy, it shouldn't give them a license to do

whatever they want and to, you know, commit towards and things like that.

It just seemed to me, you know, when I read those cases, that they were saying that the injunction is only there to protect the insurance companies for claims that arise under the policy and you can't -- you know, these third-party actions where there are separate allegations, which, you know, we have no idea if they're right or wrong, but if they are right and they do have these claims, you know, do they -- do you have a license? Like, does it give you extra protection?

Like, does that injunction really say that it can go farther than not just the policy, but if you actually did do something wrong under the policy, you know, it seems like you shouldn't. And I think that what you would say is that, Judge, with regard to bad faith claims where we independently did not handle a claim correctly -- someone made a claim and we didn't do it, okay, that's a third-party action, that's not derivative -- I think you would agree with that, right?

MR. GIANNOTTO: Yes.

THE COURT: Okay. But if you're telling us, Judge, that the claim against us is not because of our claims handling, but, you know, some common law claim that is, you know, different than that, that, you know, that is going to be derivative, I think.

MR. GIANNOTTO: I think a couple of things. One, I mean, you use the word "license." You know, this is all based on past conduct. No one is asking for a permit to commit towards into the future.

So, I think the question is, when we settle, you know --

THE COURT: Yeah, when you settle --

MR. GIANNOTTO: -- do we believe we're settling these kinds of claims.

THE COURT: And explain to me the language that's, you know, in there, and, you know, I mean, this is just language about what the debtor said, what Johns-Manville said, Travelers said about understanding that this didn't extend to third-party tort actions that, you know, it went into, it was objected to, and now it's in the agreements -- it's part of the agreement that, you know, and even the Supreme Court said, Well, we understand that these certain kinds of tort actions that were filed at the time of the settlement, they were not enjoined, but future ones -- so, the Supreme Court, itself, understood when it was reviewing Manville III that there were certain types of claims, that people had struck a deal with insurance companies and said, these are third-party tort claims, the Bankruptcy Court has no jurisdiction over them.

You know, like there's this whole history, this

whole background about the types of claims that cannot be brought -- that can be brought, that are not enjoined by the channeling injunction. You know, those sentiments, they trouble me. They make me think, okay, everyone knew -- it was almost like Travelers knew from the outset that, you know, certain third-party actions like these tort claims, they just call them "independent," they don't go into this really, you know, detailed analysis that you are claims-handling versus, you know, common-law tort -- I don't know -- whatever -- they don't make that distinction.

They just say, you know, third-party tort actions against the insurance companies were never meant to be enjoined by the channeling injunction. They were -- you know, that doesn't affect the rates, so why would it? You know, the Court has no jurisdiction.

And the Supreme Court even recognized that at the time that the settlement order was entered, those types of claims could still continue, but then the Supreme Court said that because it only affected prior claims, they couldn't possibly be accepted in the future. And the Supreme Court also said, you know, there's nowhere in there that says derivative and the Second Circuit clearly calls things that are derivative.

And I guess where we're struggling is that when I don't have the history that you do with the Johns-Manville

cases, so I don't know every single type of different cause of action there, but it basically, you know, there two pots: there's derivative and non-derivative. The only derivative claims that I can see that I can understand are the direct-action claims, which I know I can't limit myself under the Third Circuit, but all the other types of claims, you know, they just call them, you know, wrongful misconduct, torts, things like that, which sounds just like what they're saying here to me.

MR. GIANNOTTO: And, you know, I can't go all the way back into Manville --

THE COURT: I know.

MR. GIANNOTTO: -- but I don't go back to 1980. I was a practice lawyer, but I wasn't on the Manville bankruptcy.

But, you know, there was a mishmosh of evidence that was put before Judge Lifland in 2003, 2004 when this whole thing came up with Governor Cuomo or ex-Governor Cuomo, at the time. You know, what I can tell you is that 524(g), when it was enacted, you know, subsequent to the -- it didn't apply to the Manville -- it retroactively applied to the Manville (indiscernible) 524(h) basically said the Manville injunction was okay and it's sort of more global where it's -- but, you know, my memory is that if you look at the legislative history of that provision, there's nothing

specific there that says what -- this is limited to policy proceeds or it's not. I think that's clear.

But I think the idea behind this was to make it as broad as possible to encourage insurers to settle and to get as much money into this pot as you want. And the question of having a license to violate people's rights, I think is the wrong way to look at it. I think the right way to look at it is, you know, Plaintiffs' attorneys will always have ways to sort of sue the insurance company or come up with theories to sue the insurance companies, and we're trying to get finality, and that's what this statute was meant to do, was get us finality.

And, again, I disagree with you on the Manville that there's just this pot of proceeds and everything else. I think if you look at the everything else they had, they were all claims that are different from the claims here. And we're not -- I'm not drawing a distinction between bad faith claims, handling claims, and negligence claims. I'm drawing a distinction between claims that are not dependent on Grace's wrongdoing and claims that are.

And that could be common law negligence claims, like the asbestos hitting someone on the head that the Third Circuit used; that would be a common law negligence claim against us, if we run through a bag of asbestos and knock someone on the head or something.

It's not negligence versus non-negligence; it's whether our liability derives from the wrongful conduct of Grace. And when the liability is premised, as it is here, under any theory on our failure to protect them from or warn them of dangers Grace created, it is derived from Grace's wrongful conduct, within the meaning of the Third Circuit opinion.

And, again, if you look at those cases -- you said Dodds and Gas or whatever, they were not asbestos cases, so they don't really matter, I think they do really matter. I think that what they basically say is, where your liability is based on the fact that someone else screwed up and hurt someone, but you're liable because you failed to supervise or failed to do this or failed to do that, you can be liable, even though you're independently liable in court. You know, the other guy in Gas couldn't be liable because of the workers' compensation statute. You're independently liable in tort, because your liability is based on the wrongful conduct of that other person, and it's not seeking that other person's money or policy proceeds; it's seeking your own money. It's an independent tort, but it's dependent -- you know, a tort -- but it's dependent on what the other fella said.

So, I think --

THE COURT: And, you know, then there's that

troubling language. You know, there's just not a lot of stuff out there about the statutory relationship and in the Quigley case, you know, when they talk about the insurance --

MR. GIANNOTTO: Yeah, they mention -- when they're giving examples --

THE COURT: I know, they just do one sentence on the insurance --

MR. GIANNOTTO: Right. And it mentioned direct action.

THE COURT: Right. I know.

MR. GIANNOTTO: But look more closely at -- if you look more closely at Quigley, what Quigley said is its view is that Congress meant to protect causes of action that have traditionally been brought against people in these positions by third parties.

THE COURT: And it's not limited to those. I mean, I saw that.

MR. GIANNOTTO: And so, you know, these types of claims against the Workers' Comp insurer or -- if we're not an insurer, whatever they want to call us -- our claims that have been traditionally brought. I mean, in talking in the HUD case where this whole issue was briefed, there are many cases cited, and the issue is under what circumstances ask a workers' comp insurer or someone else who provides industrial hygiene services be held liable? And individual plaintiffs

have been suing such insurers under such theories for years and years and years.

We disagree over whether in this case there's a duty or over whether in this case what the standards are, but that type of case has been brought for a long time. And then Quigley also said, we don't -- we want to decline to enjoin claims that only have an accidental nexus to the bankruptcy.

This doesn't have an accidental nexus to the bankruptcy. These people were injured by Grace's conduct and they're suing us for failure to prevent Grace -- prevent the dangers caused by Grace's conduct. It's not an accidental nexus to the bankruptcy; it's a key part of this bankruptcy and it's a key part of why we and other insurers settled.

So, I agree that Quigley said direct, you know, it was giving examples and it, again, gave the examples of direct action, and I'll, of course, go back to my same thing, the Third Circuit said that's not where it's limited. I think the way that you limit it is what the Third Circuit said. You look at the elements of the cause of action, you look at them and then you decide whether that's wholly separate -- they didn't say "separate" -- wholly separate from Grace's liability or wrongdoing, you're dependent on it.

And here, if you look at the elements of the cause of action, every theory of a cause of action here involves that there had been a danger that we responded to improperly

or failed to warn about, and that danger was created by Grace's wrongful conduct. It wasn't created because asbestos was never (indiscernible) or whatever, and they're trying to argue it.

It was created because Grace undertook operations, milling operations, processing operations, which released asbestos into the air. And we didn't create the danger. I mean, they might -- they try to argue the points we increased the danger, because if we had warned them, then people wouldn't have been -- people would have walked away and wouldn't have been exposed. But we didn't increase the danger over what Grace created. Grace created a danger that was out there. What they're saying is we didn't fix it and we were negligent in not fixing it or not warning about it.

And so, every one of them -- and that's how you distinguish, it seems to me, between what the Third Circuit meant and what it didn't mean. And, again, the claims in Manville, although the language is broad in Manville -- I agree, the language is broad -- don't encompass these types of claims. So, that's all I can say.

THE COURT: That's the best explanation I have come up with so far, so thank you for giving me that.

MR. GIANNOTTO: Thank you.

THE COURT: Thank you. Did you want to respond to that?

MR. COHEN: Maybe I should wait and hear from Mr. Longosz?

THE COURT: Oh, I'm sorry, I didn't mean to cut him off.

MR. LONGOSZ: I'm trying to take a backseat to most of this, Your Honor.

THE COURT: Yeah.

MR. LONGOSZ: I don't want to be repetitive, so I just want to point out a few things that probably rises out of some of the questions that the Court had.

The one thing that's interesting is I think there was a reference to performing duties under the contract, and that's why, initially, this morning, I mentioned the contract and the insurance contract. And that would be the case if, in fact, the Court was looking at or the record had a separate contract to perform services.

So, we've heard a lot about industrial hygiene services. That's not will Workers' Comp -- that's not the Workers' Comp policy or contract, so to speak; that would be a separate contract to perform those services.

So, if, in fact, CNA, Maryland Casualty, an insurer, there was a contract to perform certain services -- industrial hygiene services, safety services on the site, be on the site all the time -- that would be a circumstance where it would be outside of the discussion we're having here

--

THE COURT: Right. But you're saying that's not the case under your contract?

MR. LONGOSZ: It's not at all.

THE COURT: Okay.

MR. LONGOSZ: And I think the --

THE COURT: I mean, I only saw the excerpts. Right. I only saw the excerpts of the contract which say that this was a service. I mean, it -- what it actually said was, It's not a duty we have to you, it's a right we have and we can't be held liable if we mess that up or don't do it or whatever.

MR. LONGOSZ: You have the duty, but not the right to inspect your place, and as it turns out --

THE COURT: Well, we have the right, but not the duty to.

MR. LONGOSZ: Right. Not the duty.

THE COURT: Right.

MR. LONGOSZ: Which is important, and Counsel had mentioned, well, Maryland Casualty was there every day. No, they weren't there every day. Incompetent came occasionally, quarterly to come and do this assessment so they could understand what was going on in the facility for purposes of insurance, for purposes operating, purposes of making sure you keep claims down. I mean, that's what Workers' Comp

policies do.

But, no, there wasn't this unbundled service that we've all been sort of talking about that, certainly, we wouldn't sit here and suggest to the Court that we would be included under the channeling injunction for that. For example, Maryland Casualty never took control, nor did any of the insurers, take control of the site.

The insurer was not there for the health and safety of the workers. That's not contained within the workers' compensation policy, and that's all that we can look to.

There was never a contract for industrial-hygiene services. And one might want to interpret the Maryland Casualty and what they did on the site and make an interpretation of those types of things, and that's why we flipped over to the argument of 324(a), and, again, we're talking about that component that includes workers and the worker claims.

And that's why the Supreme Court is looking at 324(a), because what that does -- and it goes beyond the question that the Court asked about professional -- those cases -- that line of cases of professional services. In this case Maryland Casualty or the insurers were not providing "professional services"; they were providing the insurance whatever was included in the insurance policy. They were providing the insurance contract to insure workers

who happened to be injured on the site.

But 324(a), it talks about an undertaking should recognize as is necessary for the protection of their people, but I -- third persons -- but I think the most important component of that is the A, B, and C, which nobody wants to talk about -- A, being an increased risk of harm based on negligence in the undertaking that leaves the third party in the worst position than if no undertaking had taken place in the first place; the second component being an undertaking that supplants, rather than supplements a duty owed by the other to the third party; and C is the third party suffered harm because of his reliance, meaning Grace's reliance or the others' reliance on the undertaking.

So, here, as we're arguing before the --

THE COURT: So, I thought that last one was, you know, so, if an employee relied upon it, then that's a problem.

MR. LONGOSZ: It's not the employee.

THE COURT: Okay.

MR. LONGOSZ: It's Grace.

THE COURT: Okay.

MR. LONGOSZ: And so, it would be a problem if it was the employee, but it's not the employee; it's Grace and that's what the --

THE COURT: Well, let's just take a look at that

for a second.

MR. LONGOSZ: So, this undertaking to render services to another --

THE COURT: Yeah, C.

MR. LONGOSZ: -- the "another" being Grace, and the undertaking must do harm unless the actor should recognize is necessary for the protection of a third person.

THE COURT: It's very confusing when they have "others" and things like that.

Okay. So, one who undertakes gratuitously or for consideration, so that would be CNA -- well, I know you're MCC -- but I'll just say, CNA --

MR. LONGOSZ: The insurer, yeah.

THE COURT: -- to another, which would be Grace, which he should recognize is necessary for the protection of the third party -- that's the Montana plaintiffs -- is subject to liability to the Montana plaintiffs for physical harm resulting from his failures. CNA's failure to exercise reasonable care to protect his undertaking in the harm -- this is C -- the harm is suffered because of reliance of the other or the third party upon the undertaking.

So, that means -- I read C to say that harm is suffered because of reliance of the third person upon the undertaking. So, that's the employee here.

So, I think that -- and I'm not saying that they

have a case; I have no idea if they have a case -- but if they did, they would probably go under C and say, Well, I'm the employee, I'm the third person, and I relied upon that. I thought you were going to keep me safe.

MR. LONGOSZ: The third person -- the third party suffered harm because of his reliance or the others' reliance on the undertaking.

THE COURT: Okay. So, I was down at C, but, okay. One who undertakes gratuitously or for consideration to render services to another -- so, that's CNA rendering services to Grace --

MR. LONGOSZ: Right.

THE COURT: -- which he should recognize -- CNA should recognize -- as necessary for the protection of the third person -- here, the Montana plaintiffs or its things -- is subject to -- so, CNA is subject to liability of the third person -- that's the Montana plaintiffs -- for physical harm resulting from CNA's failure to exercise reasonable care to protect his undertaking if the harm is suffered because of reliance of the third person -- the plaintiffs -- upon the undertaking.

So, if they could prove that the employee relied upon your undertaking to perform the inspection hygiene services, that that -- and they suffered from it -- then that looks like it could be a possible --

MR. LONGOSZ: The problem is that they weren't performing, nor were they --

THE COURT: I know, I just wanted to make sure that we understood, that because I think that there is, you know, if you read this, get through all the "others" and everything else, I think that there is an avenue there, but you guys are making, you know, very good arguments unfortunately for me.

MR. LONGOSZ: And, again, it all emanates out of what? It emanates out of Grace's facility, Grace's asbestos, Grace's -- as Mr. Eugene Otto said -- the Grace facility. You know, neither none of the insurers put the facility in place, nor what was occurring in that facility in place.

And the other thing that's really, really interesting, Grace -- the wrongful conduct or the conduct has to be or the recommendations have to be followed by Grace. And as we know -- and that's why I gave that anecdotal comment -- but there's nothing that has come forward or will come forward, and that's why it needs to be looked at, regarding whether, in fact, you know, those, if, in fact, you get to the point of there being recommendations and all of those things need to occur, they have to be followed.

THE COURT: Okay.

MR. LONGOSZ: And we're not to that point. So, I wanted to make sure that the Court understood that distinction there.

The other thing is there was a question about the bad faith, and looking at the Manville cases, they don't give us a whole lot other than, you know, essentially a bad faith-type of case to go on or the one -- the two different cases --

THE COURT: Right. They talk about the West Virginia and they talk about the --

MR. LONGOSZ: And let's talk about personal injury cases or cases arising out of ARD, as we talked about, and they had ample opportunity. You know, we had one, two, three, four, and, obviously, they had ample opportunity to talk about other areas.

And it's interesting that the Third Circuit, in this case, did talk about the ceiling-tile approach where, of course, you're walking by and a ceiling tile with asbestos hits you in the head, so that's not derivative of Grace's asbestos, even though it may contain Grace's asbestos.

It's interesting that at the confirmation hearing, the -- I think it was the future claimants' representative or the representative, the testimony there was, sure, we would look at derivative from the standpoint of, let's say Maryland Casualty or CNA was driving out to -- and this is in the record -- was driving to go do -- to go look at the facility, and he hits a pedestrian or he's in a car accident and, you know, it's Maryland Casualty and CNA can't claim that it was

derivative because he was going to go see Grace's facility or Grace's asbestos.

Very similar to the example, which the Third Circuit gave us all, which is, you know, contrary or contrasted with the examples that the Manville decisions give us. So, I think if the Court is looking for that distinction, rather than a distraction, I think that really gives us some guidance, in terms of maybe an approach here as to what's derivative and what isn't.

THE COURT: Okay. Thank you very much.

MR. COHEN: I just -- we've been here a long time and I just want to sum up very briefly, Your Honor. The Third Circuit opinion gives a very clear set of instructions concerning derivative liability, which is to look at the elements under Montana law and to determine whether the insured alleged liability is dependent on or wholly separate from that of Grace.

It's apparent from the briefing and the arguments that under Montana law, Grace's liability is -- excuse me -- the insurer's liability is completely separate from that of Grace. That is the beginning and the end of the inquiry, and so we would respectfully submit that you make that determination, as to derivative liability, and also that you determine that the statutory-relationship test is also not satisfied by the Montana plaintiffs' claims. Thank you.

THE COURT: Okay.

MR. GIANNOTTO: I don't think there's anything I can reply to that.

THE COURT: Well, he just told me what he wants, which I know what he wants.

Okay. Well, I'm happy to just rule on what I have before me now. If you feel the need to file something, I will listen to that. If you want to do that.

MR. GIANNOTTO: Can we confer and get back to your clerk tomorrow on that?

THE COURT: Feel free to confer. Eat chocolate. Confer. Tell me what you'd like to do. I'm going to sit here, though, unless you want me to -- is it going to take you awhile to confer?

MR. GIANNOTTO: We'll just go in the hall.

THE COURT: Oh, I'm sorry, I didn't mean to kick you out. I can just go.

All right. So, Barbara, why don't you just call me when they're done conferring, okay?

THE CLERK: Okay.

THE COURT: All right. Thank you, everybody.

COUNSEL: Thank you, Your Honor.

(Recess taken at 2:21 p.m.)

(Proceedings resumed at 2:26 p.m.)

THE COURT: I think I want the briefing, I do.

MR. GIANNOTTO: Okay.

THE COURT: You know, you made some very persuasive arguments and I want you to flush it out. You know, I've got the opinion, you know, in good shape, and all my law, and I can move things around, and I want to give you guys a quick disposition, but this is a nuance that had not occurred to me, which sounds like it may have some merit, so I'd like you to brief that issue.

So, I don't know if you independently decided that you were going to brief something?

MR. GIANNOTTO: No, that's fine, Your Honor. We had decided that whatever you wanted was fine with us.

THE COURT: Oh, you're just saying that now to cover yourself.

(Laughter)

THE COURT: But you understand, you know, my trouble. My trouble is I'm trying to reconcile, you know, the broad language in the Johns-Manville cases, you know, with derivative and non-derivative to understand, and I think your distinction about, you know, your argument about, you know, on the one hand, like if you independently messed up the claims handling versus you did something wrong under the insurance contract, which is derivative litigation, I want to see your argument. I want to understand it.

MR. GIANNOTTO: Okay, Your Honor.

THE COURT: Okay. All right. So, I don't want to be a pain, and it doesn't have to be long, but I just want to understand your argument better. So, how long do you want to take to --

MR. GIANNOTTO: You know, it's the summer schedule and we haven't conferred --

THE COURT: Yeah.

MR. GIANNOTTO: -- but would two weeks be okay?

THE COURT: That's fine.

MR. GIANNOTTO: Would that work?

THE COURT: That's fine.

MR. GIANNOTTO: Now, wait. Do people want more than that? Is the two weeks okay with everybody?

THE COURT: Okay. So, I'll say -- that's the 31st, and then would you like two weeks to respond to him, then?

MR. COHEN: Yes, Your Honor, thank you.

THE COURT: Okay. So, Barb, what's two weeks from the --

THE CLERK: The 31st?

THE COURT: Yeah.

THE CLERK: The 14th of August.

THE COURT: Okay. And then, if you want, we don't have to come back and argue; I can just rule on the papers to make it simple.

Do you want a reply?

MR. GIANNOTTO: Yeah, can we get three days for a reply after that?

THE COURT: You can get longer -- you can take a week, if you want?

MR. GIANNOTTO: Okay. Well --

THE COURT: How about August 14th here?

MR. GIANNOTTO: People are on vacation; that's the problem.

THE COURT: No problem. Okay. So, how about you file your reply by August 21st?

MR. GIANNOTTO: Okay.

THE COURT: Yeah? And then I'll rule on the papers, unless you want it offline back here. I don't think you need to, but ...

MR. GIANNOTTO: That sounds great.

He only flies back here. We train here.

THE COURT: You guys are from New York?

MR. GIANNOTTO: D.C.

THE COURT: D.C., okay.

Okay. So, I bought myself some time to consider these additional arguments, and then I'll try to get out the opinion as soon as I possibly can.

MR. GIANNOTTO: Thank you, Your Honor.

THE COURT: Thank you.

MR. COHEN: Thank you very much.

THE COURT: Have a good day.

MR. COHEN: Is there an expectation on the number of pages?

THE COURT: Well, I think, let's just all be reasonable, right?

MR. COHEN: Okay.

THE COURT: I think we are -- we're professionals here. All right. Thank you everybody.

Actually, Barb, you got those dates?

THE CLERK: Yes, Your Honor.

THE COURT: Well, you know, I don't like telling you, so I'm going to go tell Una.

THE CLERK: And I (indiscernible).

THE COURT: So, I heard you guys were scared when -- you know, we depend on the Delaware clerks to make all the notations on the docket and there's a claim objection that the debtor filed to, for some environmental claims, so even though my secretary clearly said that that argument was going to happen in August, I think the wrong thing hit the docket and then that must have, you know, scared everyone. We just want to make sure that they enter the right docket entry in this one.

MR. GIANNOTTO: We were wondering who the audience was here today. There were a bunch of people here and they couldn't have all been your clerk.

THE COURT: Well, I have my permanent clerk. I have my summer intern. I have (indiscernible) all the summer interns, because this is, you know, for us, this us and Philadelphia, this is a pleasure to have all of you really smart lawyers come in here and challenge us be intellectually. So, this is a great day. So, it's really interesting and it's good for them to see, and my judicial assistant was here, as well.

We were all very entertained.

COUNSEL: Thank you, Your Honor.

THE COURT: Thank you.

(Proceedings concluded at 2:30 p.m.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/Mary Zajaczkowski July 19, 2019
Mary Zajaczkowski, CET**D-531